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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 48

MUNRO L. LYETH, PETITIONER,

vs.

JAMES J. HOEY, COLLECTOR OF INTERNAL REVENUE FOR THE UNITED STATES FOR THE SECOND DISTRICT OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 18, 1938.

CERTIORARI GRANTED MAY 31, 1938.

SUPREME COURT OF THE UNITED STATES

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INDEX.

	Original	Print
Proceedings in U. S. C. C. A., Second Circuit	1	1
Statement under Rule 13, paragraph 4	1	1
Record from D. C. U. S., Southern New York	2	2
Summons	2	2
Complaint	3	2
Exhibit "A"—Notice of deficiency	12	8
"B"—Claim for refund	16	10
"C"—Notice of disallowance of claim	23	15
"D"—Compromise agreement	24	15
"E"—Will of Mary B. Longyear	51	32
"F"—Decree of Probate Court, April 26, 1932	62	39
Stipulation and order amending complaint	64	40
Answer	65	41
Exhibit 1—Motion before Probate Court to frame jury issues	70	44

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 27, 1938.

—6747

	Original	Print
Record from D. C. U. S., Southern New York—Continued.		
Reply to set-off and recoupment contained in answer	71	45
Exhibit "A"—Letter, deputy commissioner to executor, July 24, 1933	78	48
Amended answer	79	49
Exhibit 1—Motion before Probate Court to frame issues for jury trial	86	53
Notice of motion for summary judgment	87	54
Affidavit of J. M. Richardson Lyeth, in support of motion	89	55
Exhibit "A"—Assignment and declaration of trust, April 5, 1926	104	64
Exhibit "B"—Extract from "Assignment and Declaration of Trust, Longyear Foundation	112	70
Exhibit "C"—Extract from "Assignment and Declaration of Trust, Longyear Foundation"	117	73
Exhibit "D"—Agreements concerning pecuniary legacies and distribution of estate	117	73
Affidavit of George S. Fuller, in support of motion	144	90
Letter, Deputy Commissioner to Executor, July 24, 1933	146	91
Affidavit of James S. Y. Ivins, in support of motion	147	91
Letter, Deputy Commissioner to Executor, July 24, 1933	150	93
Affidavit of George B. Schoonmaker, in opposition to motion	151	94
Exhibit "A"—Brief in behalf of executors	155	96
Exhibit "B"—Opinion of General Counsel, Bureau of Internal Revenue	165	102
Supplemental affidavit of J. M. Richardson Lyeth, in support of motion	169	105
Exhibit "A"—Protest of deficiency tax	173	108
Exhibit "B"—Letter, Ben R. Clark to Commissioner, April 25, 1936	175	109
Supplemental affidavit of George B. Schoonmaker, in opposition to motion	176	110
Opinion granting motion for summary judgment, Coxe, J.	179	112
Order granting motion for summary judgment	188	117
Judgment	190	119
Certificate of probable cause	192	119
Petition for and allowance of appeal	193	120
Assignment of errors	195	121
Citation (omitted in printing)	199	
Stipulation as to record	200	124
Clerk's certificate (omitted in printing)	201	
Opinion, Chase, J.	202	124
Concurring opinion, Hand, J.	205	129
Judgment	207	131
Clerk's certificate (omitted in printing)	209	
Order allowing certiorari	210	133

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT.

L. 65-370

MUNRO L. LYETH, Plaintiff-Appellee,

against

JAMES J. HOEY, Collector of Internal Revenue of the United States for the Second District of the State of New York, Defendant-Appellant.

STATEMENT UNDER RULE 13, PARAGRAPH 4

This action was commenced by the issuance of a summons on November 27, 1936. The summons and complaint were filed on November 28, 1936. An order amending the complaint was filed on March 8, 1937. The answer was filed on March 11, 1937. The reply to the set-off and recoupment contained in the answer was filed on March 16, 1937. The amended answer was filed on March 23, 1937.

On March 23, 1937 the motion of the plaintiff for summary judgment was argued before Honorable Alfred C. Coxe, United States District Judge. On July 22, 1937 Judge Coxe filed an opinion granting the motion. The order for summary judgment was entered July 29, 1937 and the judgment was entered August 3, 1937.

A certificate of probable cause was filed on December 16, 1937.

The assignment of errors, the petition for and the allowance of the appeal and the citation on appeal were filed on October 28, 1937.

[fol. 2] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

L. 65, page 370

MUNRO L. LYETH, Plaintiff,

against

JAMES J. HOEY, Collector of Internal Revenue of the United States for the Second District of the State of New York, Defendant.

SUMMONS

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable John C. Knox, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 27th day of November, A. D. 1936.

Charles Weiser, Clerk. (Seal.)

Carter, Ledyard & Milburn, Plaintiff's Attorneys, Office & P. O. Address, 2 Wall Street, Borough of Manhattan, City of New York.

[fol. 3] IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT

The plaintiff, by his attorneys, Carter, Ledyard & Milburn, complaining of the defendant, respectfully shows to this Court and alleges:

First. That at all the times hereinafter mentioned the plaintiff was and now is a citizen of the United States and

resident of the City of New York, County of Bronx, State of New York and has his principal place of business at No. 2 Wall Street, Borough of Manhattan, City, County and State of New York.

Second. Upon information and belief the defendant is a citizen of the United States and a resident of the State of New York and is, and has been since December 20, 1933, the duly appointed, qualified and acting Collector of Internal Revenue of the United States for the Second District of New York, with his office located in the United States Custom House, Borough of Manhattan, City, County and State of New York.

[fol. 4] Third. That on or about the 15th day of March, 1934, there was made and filed on behalf of plaintiff with the said Collector of Internal Revenue for the Second District of New York, which was the District in which the plaintiff has his principal place of business, an individual income tax return for the plaintiff for the calendar year 1933 and there was reported therein gross income of $5,678.56, net income of $5,622.06 and an income tax payable of $166.29 which was, on or about said March 15, 1934, duly paid to the said Collector of Internal Revenue for the Second District of New York.

Fourth. Upon a review and audit of said return for the year 1933 the Commissioner of Internal Revenue erroneously and without authority of law and against the protests of the plaintiff added to the income of the plaintiff for the said year the sum of $141,484.03 alleged by the said Commissioner to have been received by the plaintiff as income during the calendar year 1933 from the estate of plaintiff's grandmother, Mary Beecher Longyear, late of Brookline, Massachusetts.

Fifth. By reason of the inclusion of said sum of $141,484.03 as taxable income in the year 1933, the said Commissioner determined a deficiency in plaintiff's income tax in the amount of $56,389.65 as set forth in his notice of deficiency dated July 28, 1936, a copy of which is attached hereto and marked "Exhibit A." Thereafter the Commissioner made an assessment against the plaintiff for the [fol. 5] amount of said deficiency of $56,389.65, together with interest thereon in the sum of $8,616.03, totalling $65,005.68. On or about October 6, 1936 plaintiff received

from defendant a notice and demand for the payment of said deficiency of $56,389.65 together with interest thereon in the sum of $8,616.03, totalling $65,005.68, all of which had been assessed as aforesaid.

Sixth. Thereafter and on or about the sixteenth day of October 1936, in consequence of and by compulsion of said notice and demand of the defendant, plaintiff paid to the defendant, as Collector of Internal Revenue of the United States for the Second District of New York, said deficiency in tax and interest of $65,005.68.

Seventh. On or about November 4, 1936 plaintiff duly filed with the defendant as said Collector of Internal Revenue of the United States a claim for the refund of said sum of $65,005.68, a copy of which is attached hereto and marked "Exhibit B." The Commissioner of Internal Revenue rendered a decision thereon by which he rejected the claim in full and on or about November 19, 1936 he mailed to the plaintiff by registered mail a notice of disallowance bearing the symbols IT:C:CC-4-CCP. A copy of said notice of disallowance is hereto annexed and marked "Exhibit C."

Eighth. Plaintiff's grandmother, Mary B. Longyear, died March 14, 1931, a resident of Massachusetts, leaving an estate which was inventoried by the temporary administrator at an amount in excess of $3,000,000. An instru- [fol. 6] ment dated December 7, 1928 purporting to be her last will and testament was offered for probate in the Probate Court of Norfolk County, Massachusetts, by the executors named therein. The heirs of said Mary B. Longyear were four living children and plaintiff and his brother who are sons of a deceased daughter of said Mary B. Longyear. The said alleged will purported to give to the plaintiff and his brother each a portrait of his mother, a rug, and $5,000; and it purported to give to the decedent's children certain rugs, portraits and other chattels, together with bequests of $10,000 and $5,000 respectively to two of the children. Except for these small bequests, the said alleged will purported to deprive the decedent's children and the plaintiff and his brother of all participation in the estate by providing that the entire residue, which was by far the greater part of the estate, should go to certain charitable organizations.

Ninth. Upon information and belief all of said heirs filed objections to the probate of said alleged will on the ground, among others, of lack of testamentary capacity. Upon information and belief a motion was made before the said Probate Court to frame jury issues and a hearing was had on this motion at which counsel for the proponents and for the contestants stated what their proofs would be and the said Probate Court, in granting the motion to frame jury issues, found that there was reasonable ground for the objections to probate.

Tenth. Upon information and belief an order was duly entered framing issues for the jury.

[fol. 7] Eleventh. Upon information and belief an agreement compromising said issues was entered into dated April 26, 1932 which provided in substance that specific and pecuniary bequests to individuals be enforced, but the specific bequests to charities and the bequest of the residuary estate to charitable organizations be disregarded and that such residuary estate be divided equally and paid by the executors one half to said charities and one half to the said heirs, including the plaintiff. The legatees and executors under the alleged will, the heirs, and the Attorney General of the State of Massachusetts were parties to said compromise agreement. Pursuant to the law of Massachusetts said compromise agreement was duly filed and approved by the said Probate Court, and on or about April 26, 1932 a decree was duly entered in said Court admitting said will to probate, issuing letters testamentary to the executors named therein, and directing said executors "to administer the estate of said deceased in accordance with the terms of said will and said agreement of compromise". A copy of said compromise agreement and a copy of the said will of said Mary B. Longyear are hereto annexed and marked respectively "Exhibit D" and "Exhibit E". A copy of the decree of said Probate Court dated April 26, 1932 is hereto annexed and marked "Exhibit F".

Twelfth. On or about July 26, 1933 the said executors, acting under the said direction of the Probate Court, distributed to the plaintiff certain property of the estate of said [fol. 8] Mary B. Longyear consisting of cash in the amount of $61.03 and a certificate of deposit for three hundred and

fifty-eight (358) units under a deposit agreement dated April 20, 1928 with The National Park Bank of New York (now The Chase National Bank of The City of New York), each unit of which represented one share of the outstanding stock of each of the following corporations: Longyear Estate, Inc., a Delaware Corporation, Longyear Corporation, a Delaware corporation, and Longyear Realty Corporation, a Michigan corporation. These units were valued by the Commissioner of Internal Revenue at $395.03632 per unit, or a total valuation of $141,423 for the 358 units received by the plaintiff.

Thirteenth. This cash and certificates of deposit were paid over by the executors at the request of the plaintiff to Longyear Heirs, Inc., a Delaware corporation, as assignee of the plaintiff. Upon information and belief, Longyear Heirs, Inc. had been organized in order to impose upon the said units an obligation to pay out of the first dividends and distributions of capital therefrom certain sums to certain legatees named in the last will and testament of Mary B. Longyear, whose specific legacies were, under the said compromise agreement, entitled to priority. The value to the plaintiff of the units delivered to Longyear Heirs, Inc. as his assignee, was, on the date of such delivery reduced by the lien of said obligation.

Fourteenth. No property or money was distributed or paid to the plaintiff by any of the charitable organizations [fol. 9] named as residuary legatees in the last will and testament of said Mary B. Longyear.

Fifteenth. The inclusion of said amount of $141,484.03 by the Commissioner of Internal Revenue in plaintiff's income for the year 1933 and the assessment and collection of said deficiency in tax with interest thereon, were illegal and erroneous for the following reasons:

(a) Said cash and said units representing said shares of stock did not constitute taxable income to the plaintiff for the year 1933 or for any other year, within the meaning of the Revenue Act of 1932 or of the Sixteenth Amendment of the Constitution of the United States of America,

(b) Said cash and said units represented property acquired by gift, bequest or inheritance within the meaning of Section 22 (b) (3) of the Revenue Act of 1932, and were therefore exempt from taxation.

(c) No sale or exchange of property upon which gain or loss was realized within the meaning of the Revenue Act of 1932 resulted from the receipt by the plaintiff of said cash or said units.

Sixteenth. If a gain or loss did result from the receipt by the plaintiff of said cash and said units, or from any surrender of rights or interest by the plaintiff, no taxable gain was realized by the plaintiff because of the fact that the [fol. 10] basis, for the purpose of determining gain or loss of any such rights or interest which the plaintiff may have surrendered, was at least as great as the value of the property and cash received therefor.

Seventeenth. If it should be determined that the value of said cash and said units were taxable income to the plaintiff, the value of said units as determined by the Commissioner was greatly in excess of the market value thereof on July 26, 1933, the date when they were delivered by the executors to Longyear Heirs, Inc. as assignee of the plaintiff. Furthermore, the Commissioner, in determining the amount of income alleged to have been received by the plaintiff, failed to deduct from the market value of said units on said date the proportionate amount of the prior obligation imposed upon said units to pay specific legacies which were represented by preferred stock of Longyear Heirs, Inc.

Eighteenth. Notwithstanding the facts herein alleged, and notwithstanding the provisions of law in that behalf made and provided, no part of said illegal deficiency in tax in the amount of $65,005.68 has been refunded, credited, or paid back to the plaintiff although the same has been duly demanded.

Nineteenth. By reason of the premises, the right has accrued to the plaintiff to have and maintain this suit to recover from the defendant, as Collector of Internal Revenue of the United States for the Second District of New York, as aforesaid, the said sum of $65,005.68, being the said [fol. 11] deficiency in tax as assessed and illegally collected by the Collector of Internal Revenue and claimed in said claim for refund filed and disallowed as aforesaid.

Twentieth. This is a suit of a civil nature at common law and the matter in controversy, exclusive of interest and

costs, exceeds the sum or value of three thousand dollars ($3,000) and this suit and the cause of action herein set forth arose under the Constitution and Laws of the United States and the Laws of the United States providing for internal revenue.

Wherefore, plaintiff demands judgment against the defendant in the sum of $65,005.68 with interest thereon from October 16, 1936, together with the costs of this action.

Carter, Ledyard & Milburn, Attorneys for Plaintiff, Office and P. O. Address, No. 2 Wall Street, Borough of Manhattan, City of New York.

Duly sworn to by Munro L. Lyeth. Jurat omitted in printing.

[fol. 12] EXHIBIT "A" TO COMPLAINT

Treasury Department, Washington

Office of Commissioner of Internal Revenue

Jul. 28, 1936.

Mr. Munro Longyear Lyeth, % J. M. Richardson Lyeth, 2 Wall Street, New York, New York.

SIR:

You are advised that the determination of your income tax liability for the taxable year(s) 1933 discloses a deficiency of $56,389.65, as shown in the statement attached.

[fol. 13] In accordance with section 272 (a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing and filing of this form will expedite the closing of your return(s) by permitting an

early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully, Guy T. Helvering, Commissioner, by Chas. T. Russell, Deputy Commissioner.

Enclosures: Statement, Form 870.

[fol. 14] Statement

IT:AR:B—2.
MEK—90D.

In re Mr. Munro Longyear Lyeth, % J. M. Richardson Lyeth, 2 Wall Street, New York, New York

Income Tax Liability

Year	Income Tax Liability	Income Tax Assessed	Deficiency
1933	$56,555.94	$166.29	$56,389.65

Information on file in this office discloses that under date of July 26, 1933 there was distributed to the contestants under the will of Mary Beecher Longyear, The First National Bank of Boston et al., executors, Boston, Massachusetts, one half of the net residue in units of stock of Longyear Estate, Inc., Longyear Corporation and Longyear Realty Corporation and cash computed as of May 1, 1933.

Your portion is shown as 358 units at $395.0362 or $141,423.00 and cash of $61.03 making a total of $141,484.03 which has been added to your taxable income.

Ordinary net income shown on return		$5,622.06
Add:		
Income received from estate		141,484.03
Ordinary net income adjusted		$147,106.09
[fol. 15] Less:		
Dividends	$142.50	
Personal exemption	1,000.00	1,142.50
Balance subject to normal tax		$145,963.59
Normal tax at 4% on $4,000.00		$160.00

Normal tax at 8% on $141,963.59	11,357.09
Surtax on $147,106.09	45,070.92
Total tax	$56,588.01
Less:	
Income tax paid at source	32.07
Corrected income tax liability	$56,555.94
Income tax assessed, original account $811561	166.29
Deficiency in tax	$56,389.65

A preliminary letter was sent from this office on December 17, 1935, proposing the above amount of deficiency in tax. Conferences were requested in this office and held on March 23 and May 7, 1936. The issue discussed was the taxability of income received from the Estate of Mary Beecher Longyear as the result of a compromise settlement. After consideration of the information furnished at the conferences, no agreement could be reached. It is therefore necessary to issue letter of final determination at this time.

[fol. 16] EXHIBIT "B" TO COMPLAINT

Claim

To be Filed With the Collector Where Assessment was Made on Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☐ Refund of Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate or income taxes).

Collector's Stamp.

(Date received) Received Collector of Internal Revenue 2nd Dist. of New York, Nov. 4 1936.

Claims Division, by J. E. R.

STATE OF MASSACHUSETTS,
County of Middlesex, ss:

Name of taxpayer or purchaser of stamps: Munro Longyear Lyeth.
Business address: % J. M. Richardson Lyeth, 2 Wall Street, New York, N. Y.
Residence: ——.

[fol. 17] The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Second District of New York.
2. Period (if for income tax, make separate form for each taxable year) from Jan. 1, 1933 to Dec. 31, 1933.
3. Character of assessment or tax Income tax and interest.
4. Amount of assessment, $65,171.97; dates of payment March 15, 1934, October 16, 1936.
5. Date stamps were purchased from the Government ——, ——.
6. Amount to be refunded or such greater amount as is legally refundable $65,005.68.
7. Amount to be abated (not applicable to income or estate taxes) $—.
8. The time within which this claim may be legally filed expires, under Section 322 of the Revenue Act of 1932, on October 16, 1938.

The deponent verily believes that this claim should be allowed for the following reasons:
See Statement Annexed Hereto and Made a Part Hereof.
(Signed) Munro L. Lyeth.

Sworn to and subscribed before me this 29 day of Oct. 1936. F. W. Davies, Notary Public. My commission expires Feb. 27, 1938. (Seal.)

[fol. 18] Statement

The above assessment was an additional assessment of Federal income tax and interest on a sum of $141,484.03 alleged by the Commissioner of Internal Revenue to have

been received by the taxpayer during the calendar year 1933 from the estate of the taxpayer's grandmother, Mary Beecher Longyear, late of Brookline, Massachusetts. The taxpayer contends that this amount did not constitute income taxable to him in the calendar year 1933, or in any other year, and that the tax and interest in the amount of $65,005.68, which was assessed by reason of the said alleged income, was illegally assessed and collected.

The Taxpayer is a grandson of Mary Beecher Longyear, who died a resident of Brookline, County of Norfolk, Commonwealth of Massachusetts, on March 14, 1931, leaving an alleged will dated December 7, 1928. Certain of the heirs of the said Mary Beecher Longyear contested the probate of the said will, and thereafter a compromise agreement was entered into between all of the heirs of Mary Beecher Longyear and the residuary legatees named in the said will. Pursuant to the law of Massachusetts, the said compromise agreement was duly approved by the Probate Court, the will with said compromise agreement was admitted to probate, letters testamentary were issued to the executors named in the said will, and the said executors were directed to administer the estate in accordance with the terms of said will and said compromise agreement.

On or about July 26, 1933, the said executors, acting under [fol. 19] the direction of the Probate Court, distributed to the taxpayer certain property of the estate of Mary Beecher Longyear, consisting of a Certificate of Deposit for 358 Units under a Deposit Agreement dated April 20, 1928, with the National Park Bank of New York (now the Chase National Bank), each unit of which represented one share each of the outstanding stock of Longyear Estate, Incorporated, a Delaware corporation, Longyear Corporation, a Delaware corporation, and Longyear Realty Corporation, a Michigan corporation, together with cash in the amount of $61.03. These units were valued by the Commissioner of Internal Revenue at $395.03632 per unit, or a total valuation of $141,423.

This property and cash were paid over by the executors at the request of the taxpayer to Longyear Heirs, Inc., a Delaware corporation, as assignee of the taxpayer. This corporation, Longyear Heirs, Inc., had been organized in order to impose upon the said units an obligation to pay out of the first dividends and distributions of capital therefrom cer-

tain sums to certain legatees named in the last will and testament of Mary Beecher Longyear, whose specific legacies were, under the compromise agreement, entitled to priority. The value to the taxpayer of the units paid over to Longyear Heirs, Inc., as his assignee, was, at the date of such payment, reduced by the lien of said obligation. No property or money was distributed or paid to the taxpayer by any of the legatees named in the last will and testament of the said Mary Beecher Longyear.

The valuation of $395.03632 per unit adopted by the Com-
[fol. 20] missioner of Internal Revenue was greatly in excess of the said fair market value thereof on the date of distribution by the executors. This value represented the result after certain adjustments had been made to a value of $400 used in the compromise agreement. This value of $400 per unit was also used by the executors in their inventory and purported to represent the market value of the units as of the date of the death of the testatrix on March 14, 1931. It did not represent, or purport to represent, the value of such units on the date of the distribution on or about July 26, 1933, and was, in fact, greatly in excess thereof by reason of the enormous shrinkage in property values between the two dates.

The taxpayer respectfully submits:

(1) That the said property and cash distributed to him during the calendar year 1933 by the executors of the estate of Mary Beecher Longyear did not constitute income to the taxpayer for the calendar year 1933, or for any other year within the meaning of the Revenue Act of 1932 or of the Sixteenth Amendment to the Constitution of the United States of America.

(2) That the taxpayer realized no taxable profit or gain as the result of the compromise agreement affecting the administration and distribution of the estate of Mary Beecher Longyear.

(3) That no exchange from which gain or loss is recog-
[fol. 21] nized within the meaning of the Revenue Act of 1932 resulted from the receipt by the taxpayer from the executors of the last will and testament of Mary Beecher Longyear of certain property and cash in the calendar year 1933, but if any such exchange did result from the said transaction no gain was realized by the taxpayer because

of the fact that the basis for the purpose of determining gain or loss from the surrender of any rights or interest which the taxpayer may have given up was at least as great as the value of the property and cash received therefor.

(4) That the property and cash distributed to the taxpayer by the executors of the last will and testament of Mary Beecher Longyear were in the nature of an inheritance, bequest, or gift, within the meaning of Section 22(b) of the Revenue Act of 1932,

(5) That if the taxpayer did receive taxable income as the result of the compromise agreement affecting the administration and distribution of the estate of Mary Beecher Longyear, the fair market value of the property received on or about July 26, 1933, was less than the sum of $141,423 as determined by the Commissioner of Internal Revenue.

(6) That the deficiency in income tax in the sum of $56,389.65 and interest of $8,616.03 was illegally assessed and collected and should be refunded to the taxpayer together with interest at six per cent. (6%) per annum from the date of payment, October 16, 1936.

Munro L. Lyeth.

[fol. 22] Certificate of Attorney

The undersigned, an attorney-at-law associated with the firm of Carter, Ledyard & Milburn, No. 2 Wall Street, New York, N. Y., attorneys for Munro Longyear Lyeth, hereby certifies that he prepared the foregoing claim for refund. The statements contained therein are true to the best of his knowledge, information and belief and are based upon information contained in the files of the said Munro Longyear Lyeth. This certificate is annexed to said protest in accordance with the provisions of Section 2 (g) of Treasury Department Circular 230 Revised.

Dated, New York, N. Y., October 23, 1936.

Ben R. Clark.

[fol. 23] EXHIBIT "C" TO COMPLAINT

Treasury Department, Washington

Office of Commissioner of Internal Revenue

IT:C:CC—4—CCP.

Nov. 19, 1936.

Mr. Munro Longyear Lyeth, c/o Mr. J. M. Richardson Lyeth, 2 Wall Street, New York, New York.

In re Claim for Refund of $65,005.68 for the Year 1933

SIR:

Reference is made to Bureau letter dated November 14, 1936 wherein you were informed that the claim for refund indicated above would be disallowed. The letter also stated the reasons for the proposed disallowance.

The claim having been disallowed or rejected on Schedule numbered 23012, this notice of disallowance is sent to you by registered mail as required by Section 1103(a) of the Revenue Act of 1932.

Respectfully, Guy T. Helvering, Commissioner, by Chas. T. Russell, Deputy Commissioner.

[fol. 24] EXHIBIT "D" TO COMPLAINT

THE COMMONWEALTH OF MASSACHUSETTS,
Norfolk, ss:

PROBATE COURT

No. 77618

In the Matter of Estate of MARY BEECHER LONGYEAR

Agreement of Compromise

Whereas Mary Beecher Longyear, late of Brookline in the County of Norfolk and Commonwealth of Massachusetts, (hereafter called the "decedent"), deceased on the fourteenth day of March, 1931, leaving an instrument purporting to be her last will, dated December 7, 1928, (here-

inafted called "said will"), which instrument has been offered for probate in the Probate Court for said County upon the petition of Smith Johnson of said Brookline, Howard N. Pease, now of Newton, Massachusetts, and The First National Bank of Boston, named as executors in said will, praying that said will be proved and allowed and letters testamentary issued to them; and

Whereas numerous controversies have arisen between Abby Beecher Roberts (also known as Abby Longyear Roberts or Abby Roberts), Helen Longyear Paul, John M. Longyear, and Robert D. Longyear (also known as Robert Longyear), children of the decedent, and J. M. Richardson Lyeth, Jr. (also known as Richardson Lyeth) and Munro Longyear Lyeth (also known as Munro Lyeth), minor sons of the de-
[fol. 25] cedent's deceased daughter, Judith, being the only heirs at law and next of kin of the decedent and being all of the persons entitled to the estate of the decedent under the laws regulating the descent and distribution of intestate estates, on the one hand, and those persons, parties hereto, who claim as devisees and/or legatees under said will, on the other hand; and

Whereas all of the said heirs or next of kin of the decedent, the persons named in said will executors, and all other parties hereto desire to adjust by compromise all controversies of every kind and description with respect to the estate of the decedent, with respect to the due execution of said will, with respect to the validity of the bequests and gifts therein contained, and with respect to the validity of gifts and conveyances made by the decedent during her lifetime to certain charitable trusts and foundations hereinafter mentioned of any property not listed in the Special Administrator's Inventory hereinafter referred to

Now, therefore, this agreement witnesseth that:

1. The said Abby Beecher Roberts, Helen Longyear Paul, John M. Longyear, Robert D. Longyear, J. M. Richardson Lyeth, Jr. and Munro Longyear Lyeth (hereinafter sometimes called "the heirs" and each of them an "heir"); and

2. The said The First National Bank of Boston and Smith Johnson and Howard N. Pease as the persons named as executors in said will; and

[fol. 26] 3. R. Howard Cooley, A. Marguerite Smith and Madie R. Knox, as they are the Trustees under a certain

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instrument entitled "Assignment and Declaration of Trust, Longyear Foundation" dated April 5, 1926 as amended August 17, 1927 and December 11, 1928 (hereinafter sometimes called "Longyear Foundation"); and

4. Howard N. Pease, Kenneth B. Bond and William R. Knox, as they are the Board of Visitors of said Longyear Foundation; and

5. The First National Bank of Boston and Frederick P. Burrall of Marquette, Michigan, as they are the Trustees under a certain instrument entitled "Assignment and Declaration of Trust" dated April 5, 1926 executed by and between the decedent and the said Frederick P. Burrall and said The First National Bank of Boston, as amended August 17, 1927 and December 12, 1928 (hereinafter sometimes called the "Endowment Trust"); and

6. Joseph E. Warner, as he is Attorney General of the Commonwealth of Massachusetts,

The above named parties including all the persons entitled to the estate of the decedent under the laws of the Commonwealth of Massachusetts regulating the descent and distribution of intestate estates, the persons named as executors in said will and all persons claiming as devisees or legatees under said will whose interests will be affected by the compromise under this Compromise Agreement,

[fol. 27] Do hereby in consideration of the mutual covenants and agreements herein set forth agree for themselves, their heirs, executors, administrators, successors and assigns, each party for himself or herself but not for any other party, as follows:

First. The said will shall be admitted to probate and letters testamentary shall issue forthwith; and the executors shall forthwith qualify; and the estate of the decedent shall be administered and distributed as hereinafter provided.

Second. The provisions of Item 1 of said will shall be carried out as set forth in said will.

Third. The provisions of Item 2 of said will shall not be carried out, but the real estate and buildings described in said Item 2 shall be free and clear of any trusts declared

in said Item 2 and shall be disposed of as provided in the Twelfth and subsequent paragraphs thereof, except that if, under the provisions of the Twelfth and subsequent paragraph hereof said real estate and buildings shall become a part of that half of the "net residue" to which the Trustees of the Endowment Trust shall become entitled, title to said real estate and buildings shall vest in the Trustees of Longyear Foundation instead of in the Trustees of the Endowment Trust and the vesting in the Trustees of Longyear Foundation of title to said real estate and buildings shall be in satisfatcion pro tanto of the distribution required to be made to the Trustees of the Endowment Trust in accordance with the provisions of the Twelfth and subsequent paragraphs hereof. Nothing contained in this [fol. 28] paragraph Third shall limit the right of the executors to sell said real estate and buildings.

Fourth. The provisions of Item 3 of said will shall be carried out, except that title to no property shall pass or be transferred by virtue of so much of said Item 3 of said will as reads "and also any other houses wherever situated owned by me at the time of my passing on and formerly owned or occupied by said Mary Baker Eddy, and any parcel of land upon which such house or houses so owned or occupied may stand, or which may be reasonably necessary in the opinion of my executors for the proper preservation of such house or houses as historical monuments" but any property described in the quoted provision shall be disposed of in the manner hereinafter provided in the Twelfth and subsequent paragraphs hereof.

Fifth. The provisions of Item 4 of said will shall not be carried out.

Sixth. The provisions of Items 5 to 29 both inclusive of said will shall be carried out as set forth in said will. Any property of the estate referred to in any of said Items 5 to 29 both inclusive which by law falls into the residue of said estate shall be administered and distributed as provided in the Twelfth and subsequent paragraphs hereof.

Seventh. The provisions of Item 30 of said will shall be [fol. 29] carried out except that if adjudged by a court of competent jurisdiction that there is no corporation or association known as the Historical Library of the Upper

Peninsula situated in Marquette, Michigan, and that the decedent intended to name the Marquette County Historical Society, situated in Marquette, Michigan, as the legatee in this item, none of the parties hereto shall make any claim to the whole or any part of the $25,000 bequeathed by said Item 30. If as a matter of law any part or all of said sum falls into residue of said estate it shall be administered and distributed as provided in the Twelfth and subsequent paragraphs hereof.

Eighth. The provisions of Item 31 of said will shall not be carried out and the property therein described shall be disposed of, administered and distributed as provided in the Twelfth and subsequent paragraphs hereof.

Ninth. The provisions of Item 32 of said will shall not be carried out as set forth in said will, but all legacy, succession, inheritance, and estate taxes, if any, properly payable shall be paid out of the "gross estate" as defined in paragraph Thirteenth, sub-paragraph (1), of this Compromise Agreement.

Tenth. In view of the execution of this Compromise Agreement and the provisions herein made for the persons described in Item 33 of said will, the provisions of said Item 33 shall be disregarded.

Eleventh. The provisions of Items 34, 35, 36 and 37 of [fol. 30] said will shall be carried out as set forth in said will, except in so far as said provisions may in any case be inconsistent with any other provisions of this agreement, and except that reference in Item 36 to disposition of property as a part of "my residuary estate" shall mean disposition of said property as provided in the Twelfth and subsequent paragraphs hereof.

Twelfth. Immediately upon the appointment and qualification of the executors of said will initially appointed, the executors shall pay or cause to be paid to or upon the several orders of Abby Beecher Roberts, Helen Longyear Paul, John M. Longyear and Robert D. Longyear the sum of $50,000 each in cash. As soon as possible thereafter the executors shall pay or cause to be paid to the Trustees of the Endowment Trust the sum of $200,000 less the sum of $35,041.78 (heretofore paid by the Special Administrator of the decedent's estate on account of the expense of pre-

paring the will case) to be paid in part or in whole in cash or at the option of said Trustees of the Endowment Trust in municipal bonds listed in said Special Administrator's Inventory now on file in said Court at their quoted market value (or at the option of said Trustees at said inventory value if higher) and accrued interest as of the date of said payment or in a note or notes of Longyear Estate, Inc., Longyear Corporation or Longyear Realty Corporation at face value and accrued interest. Such payment of delivery of bonds or notes to the Trustees of the Endowment Trust shall be made coincidentally with the delivery by the Trus-[fol. 31] tees of the Endowment Trust to the executors of an agreement duly executed by the Trustees of the Endowment Trust in the form or substantially in the form hereto annexed marked "A," and such payments to or upon the several orders of the said Abby Beecher Roberts, Helen Longyear Paul, John M. Longyear and Robert D. Longyear shall be made coincidentally with the delivery by them to the executors of an agreement duly executed by them in the form hereto annexed marked "B." Said Abby Beecher Roberts, Helen Longyear Paul, John M. Longyear and Robert D. Longyear hereby agree that they will pay or cause to be paid from said total amount of $200,000 received by them as above provided, all fees and disbursements of William H. Best, as guardian ad litem for J. M. Richardson Lyeth, Jr. and Munro Longyear Lyeth, all fees and disbursements of counsel for all the heirs and for said guardian ad litem, and reimbursement to said Helen Longyear Paul in the sum of $10,000 for fees and disbursements by her heretofore paid, and that they will distribute or cause to be distributed the balance of said $200,000 after the payment of such fees, disbursements and reimbursement as follows: one-fifth to Abby Beecher Roberts, one-fifth to Helen Longyear Paul, one-fifth to John M. Longyear, one-fifth to Robert D. Longyear, one-tenth to J. M. Richardson Lyeth, Jr. and one-tenth to Munro Longyear Lyeth.

Thirteenth. The "net residue" of the estate as hereinafter defined shall be divided equally between the Trustees [fol. 32] of the Endowment Trust on the one hand and the heirs on the other hand, such division or distribution to be carried out as hereinafter provided. The "net residue" of the estate for the purposes of this agreement shall be

determined by subtracting from the "gross estate" as defined in sub-paragraph (1) hereof the "deductions" as defined in sub-paragraph (2) hereof;

(1) The "gross estate" shall be determined by taking the total of the following items:

(a) The real and personal property listed in the inventory of the Special Administrator on file in said Probate Court at the appraised value as shown therein, except that if any of said property so listed is transferred to the Trustees of the Endowment Trust under the provisions of paragraph Twelfth hereof or is sold for the purpose of paying debts, taxes, expenses of administration or legacies (other than any expense or disbursement whether for counsel fees or otherwise, incurred by said Special Administrator or by the executors in connection with the controversies hereby settled) the value at which such property is so transferred to the Trustees of the Endowment Trust and the actual amount realized upon such sale shall be used in lieu of the appraised value of the property so transferred or sold;

(b) All amounts paid and/or to be paid to the estate of the decedent by the executors of the estate of John M. Longyear, the amount of which in said inventory is given as undetermined;

[fol. 33] (c) All other sums of principal or income received and that shall be received by the Special Administrator of the estate of the decedent and/or by her executors from the date of her death.

(d) All other property not included in the said inventory and belonging at any time to the estate of the decedent.

(2) The "deductions" shall be determined by taking the total of the following items:

(a) The fees and expenses of The First National Bank of Boston as Special Administrator and the fees and expenses of the executors including the necessary expenses of keeping the real estate listed in said inventory in proper condition for sale for the period of thirteen months hereinafter referred to but not including such real estate expenses thereafter; but in determining the "net residue" there shall not be deducted any expense or disbursement, whether for counsel fees or otherwise, incurred by the said

Special Administrator or by the executors in connection with the controversies hereby settled;

(b) The debts of the decedent paid by the Special Administrator or properly payable by the executors from said estate, and all legacy, succession, inheritance and estate taxes, and any income taxes properly payable from said estate, all as finally adjusted or adjudicated;

[fol. 34] (c) The sum of $400,000; (See paragraph Twelfth hereof)

(d) The amount of such of the pecuniary legacies in Items 17 to 28 both inclusive and in Item 30 in said will as are properly payable by the executors under the rules of law applicable;

(e) Such articles of tangible personal property as are distributed as specific bequests under the terms of said will, at the values stated in the appraisal of personal property made by J. Robert Boomer, dated May 6, 1931, an original of which is on file with The First National Bank of Boston.

Fourteenth. If it proves advisable to sell for the purpose of paying debts, taxes, expenses of administration or legacies any real estate or any units of stock as defined in paragraph Fifteenth of this Compromise Agreement and listed in said Special Administrator's Inventory, and the executors receive a bona fide offer for such property, shall first notify each of the heirs in writing addressed to such heir in care of the estate of J. M. Longyear, Longyear Building, Marquette, Michigan, stating in such notice what real estate is proposed to be sold and the amount of the bona fide offer therefor which has been received, and, in case a sale of any such units is proposed, the number of such units proposed to be sold and the bona fide offer per unit. Such notice shall be given at least thirty days prior to the date of any such proposed sale.

[fol. 35] In case it is proposed to sell any of said units of stock for one or more of such purposes, each of the heirs shall have an option for thirty days from the date of the mailing of such written notice to purchase all or any part of his or her proportion of the units proposed to be sold (the proportion to be the same as hereinafter set forth in paragraph Fifteenth hereof), such right to purchase to be at the same price and upon the same terms and condi-

tions as the sale proposed to be made by the executors. Upon the expiration of such thirty day period, the executors shall notify each of the heirs in writing addressed as above with respect to the number of units upon which the options above provided for have not been exercised and each of the heirs shall thereupon have the right to purchase any part or all of his said proportion thereof in the same manner and at the same price and on the same terms as above provided; and each heir who shall wish to make such a purchase shall notify the executors in writing addressed to them in care of The First National Bank of Boston, Boston, Massachusetts, of his desire to make such purchase and shall specify in such writing the number of such units that he desires to purchase within his quota and the number of units that he is willing to purchase in excess of his quota. Ten days after said executors have given notice to the heirs of the number of units of stock available for purchase, the executors shall allot the remaining units so proposed to be sold among those of the heirs who shall have so notified the executors of their intention to buy and if any heir has [fol. 36] not given notice of his intention to purchase his full quota, the remainder of his quota shall be allotted to those desiring to purchase in excess of their quota pro rata according to the respective excess amounts requested by them. Upon receiving notice of allotment, each heir who has given notice of his desire to purchase shall make payment for the units so allotted in accordance with the terms of the original proposed sale, but in no event earlier than ten days from the date of the mailing of said allotment notice. None of said units of stock shall, however, be sold by the executors except for the purposes aforesaid unless sold to an heir exercising an option given him under paragraph Eighteenth hereof or unless sold under the provisions of paragraph Nineteenth hereof.

Fifteenth: At the expiration of thirteen months from the date of the giving of bond by the executors initially appointed, the "net residue" shall be tentatively determined as hereinbefore provided. If any of the "deductions" as hereinbefore provided shall not at that time have been finally determined there shall be included among the "deductions", in lieu of such undetermined items, such sum as in the reasonable judgment of the executors shall be necessary to provide for the payment of such undetermined

items of "deductions". The "net residue" as thus tentatively determined shall be divided half and half. The heirs shall be entitled to receive forthwith one-half of the "net residue" as thus tentatively determined which shall be payable in units of stock of Longyear Estate, Inc., a Delaware Corporation, Longyear Corporation, a Delaware [fol. 37] Corporation, and Longyear Realty Corporation, a Michigan Corporation, carrying all rights of ownership from and after the expiration of said thirteen months; except that the first dividend paid after the expiration of said period of thirteen months shall be apportioned as between the "gross estate" and the heirs, the heirs receiving the proportion of such dividend which the number of days between the expiration of said thirteen months period and the date of the payment of said first dividend bears to the total number of days between the date of the payment of the last dividend paid before the expiration of said thirteen months period and the date of the payment of said first dividend. The Trustees of the Endowment Trust shall be entitled to receive forthwith the other half of the "net residue" as thus tentatively determined and current interest, dividends and income therefrom shall be apportioned in like manner as above provided. For the purpose of this agreement, a "unit" shall consist of three (3) shares of stock, being one (1) share of the stock of each of said three corporations, and such payment in stock shall be made by subdividing the certificate of deposit of National Park Bank of New York (now Chase National Bank) referred to in the said inventory of said Special Administrator and causing new certificates of deposit to be issued severally in the names of the heirs as hereinafter provided. Reference to units in this Compromise Agreement is to the units as they now exist, but it is intended to include the present units in whatever forms they or their proceeds may be at the time, [fol. 38] whether as a result of any split-up of shares, stock dividend, extraordinary distribution in property or cash, reorganization, change in capital structure, sale or purchase of corporate properties, establishment or dissolution of voting trust, or any change. For the purpose of ascertaining the number of units to which the heirs and each of them shall be entitled, the sum to which the heirs shall be entitled as one-half the "net residue" shall be translated into units at the value per unit as above defined, determined

as hereinafter provided. The stock to which the heirs shall be entitled shall be divided among them and transferred to the heirs severally as follows: one-fifth to Abby Beecher Roberts, one-fifth to Helen Longyear Paul, one-fifth to John M. Longyear, one-fifth to Robert D. Longyear, one-tenth to J. M. Richardson Lyeth, Jr., and one-tenth to Munro Longyear Lyeth. If upon such division, one or more of the heirs shall become entitled to receive a fraction of a full unit, he or they shall be paid in cash the value of such fraction.

Sixteenth. The executors shall use due diligence to liquidate and pay all claims against the estate so that the amount of all deductions as above defined may be determined as speedily as possible, and as soon as may be after the expiration of the period of thirteen months defined in the preceding paragraph and after payment of all debts, taxes, expenses of administration and legacies all deductions and the said "net residue" shall be finally determined. If it [fol. 39] shall then appear that the "net residue" as so finally determined exceeds the "net residue" tentatively determined, the heirs shall thereupon be entitled to one-half of such excess, such additional amount to be paid to the heirs severally in units of stock as above defined in the same manner and proportions and at the same value per unit and carrying dividends and all rights of ownership from and after the date of such final distribution; and the Trustees of the Endowment Trust shall similarly be entitled to the other half. If it shall appear upon such final determination that the "net residue" is less than as tentatively determined, the said Trustees shall repay an amount equivalent to one-half of the deficiency and each of the heirs shall forthwith transfer to the executors such number of units as would amount at the value per unit determined as hereinafter provided to his proportion of the other half of such deficiency, namely, Abby Beecher Roberts one-fifth, Helen Longyear Paul one-fifth, John M. Longyear one-fifth, Robert D. Longyear one-fifth, J. M. Richardson Lyeth, Jr. one-tenth, and Munro Longyear Lyeth one-tenth. Upon such final determination fractional units shall be adjusted by cash payments. At the time of such final determination of "net residue" and the transfer of units to the heirs as above provided, the certificates of deposit for all stock of Longyear Estate, Inc., Longyear Corporation and Long-

year Realty Corporation, then to be distributed and not being distributable to the heirs, shall forthwith be transferred into the name of the Trustees of the Endowment ment Trust, and shall be retained by them until the time [fol. 40] hereinafter provided for the exercise of options by the heirs shall have expired, except as otherwise provided in paragraph Nineteenth hereof.

If at any time or from time to time after the final distribution has been made as provided for in this paragraph Sixteenth, other assets or property not used in making the final determination of "net residue" as herein defined shall be discovered to be the property of the decedent's estate, such property or the cash proceeds thereof shall on each such occasion be divided in two equal parts, and one part shall be distributed to the Trustees of the Endowment Trust, and the other part shall be distributed to the heirs in the same proportions as above provided in this paragraph.

Seventeenth. The value at which a unit of stock as defined in paragraph Fifteenth hereof shall be distributed or distributable under paragraphs Fifteenth and Sixteenth hereof, and the price at which said units may be purchased under the options of paragraph Eighteenth hereof shall be $400.00 per unit, except that if any property is transferred to the Trustees of the Endowment Trust under the provisions of paragraph Twelfth hereof or if it proves necessary to sell for the purpose of paying debts, taxes, expenses of administration or legacies (excepting any expense or disbursement whether for counsel fees or otherwise, incurred by the Special Administrator or by the executors in connection with the controversies hereby settled) any of the [fol. 41] assets enumerated in the Special Administrator's inventory other than the units of stock herein defined, and such property is so transferred or such assets are sold at a price or prices varying from those contained in the Special Administrator's inventory and the net result of all such transfers and sales is a loss from said inventory prices, the ratio expressed as a percentage which such sum representing such loss bears to the inventory valuation of the assets in the Special Administrator's inventory other than the units of stock herein defined shall be computed; and all the assets listed in said inventory not so transferred or sold, including said units of stock but excluding cash and

articles of tangible personal property specifically bequeathed, shall, for the purposes of division, be marked down in value from the valuation given in the inventory by the percentage so computed. The value of $200.00 per unit for units of stock distributed or distributable under paragraphs Fifteenth and Sixteenth of this Compromise Agreement and the option price of $400.00 per unit for the units of stock optioned to be sold shall be reduced by the same percentage. In case any units of stock as herein defined are sold at a loss from inventory value, the amount received from and the loss incurred upon the sale of said units shall not be included in the computation of the percentage above defined.

Eighteenth. At any time and from time to time during the period beginning at the effective date of this Compromise Agreement and ending one year after the date of the allowance of the final account of the executors, the heirs [fol. 42] shall each have an option (which shall be assignable except as expressly limited by sub-paragraph (g) of this paragraph Eighteenth) to purchase all or any of said units belonging to the decedent at the time of her death, upon the conditions and terms following:

(a) Written notice of the intention to exercise each such option shall be given by the heir intending to exercise the same. Such notice shall be signed by him, shall specify the number of units of such shares he proposes to purchase, and shall be addressed to the executors and to the Trustees of the Endownment Trust in care of The First National Bank of Boston, Boston, Massachusetts.

(b) The purchase of stock under this paragraph Eighteenth shall be by units of the same kind and at the same price as hereinbefore described for distribution of units to the heirs as their share of "net residue".

(c) Abby Beecher Roberts, Helen Longyear Paul, John M. Longyear and Robert D. Longyear shall each have the option to purchase the whole or any part of one-fifth, and J. M. Richardson Lyeth, Jr. and Munro Longyear Lyeth shall each have the option to purchase the whole or any part of one-tenth, of the total of said units of stock.

(d) Upon any exercise of any of these options the heir exercising the option shall make a first payment in cash

equal to one-third of the purchase price of the units thereby [fol. 43] to be purchased, and the balance of such purchase price shall be paid one-half in one year from the date of exercise of the option and the remainder in two years from the date of exercise of the option, with interest payable annually at the rate of 6% per annum on the balance of purchase price remaining unpaid, with the privilege of anticipating all or any part of any payment.

(e) Immediately upon any exercise of any option and the payment of one-third of the price thereunder, as above provided, title to the units of stock thereby purchased shall pass to the purchaser, carrying dividends and all rights of ownership, and a new certificate of deposit representing the units so purchased shall be issued forthwith in the name of the purchaser who shall immediately pledge the same with the seller as security for the payment of the balance of the purchase price thereof and interest.

(f). At the expiration of one year from the date of the allowance of the executors' final account the Trustees of the Endowment Trust shall notify each of the heirs as to the number of units with respect to which the options above provided for have not been exercised and which have not been distributed or become distributable to the heirs under the provisions of paragraphs Fifteenth and Sixteenth hereof. Each of the heirs shall thereupon have the right to purchase any part or all of his said proportion of said units in the [fol. 44] same manner, at the same price, and on the same terms as above provided for the original purchase of units under options; and each heir who shall wish to make such a purchase shall notify the Trustees of the Endowment Trust in writing, addressed to them in care of The First National Bank of Boston, Boston, Massachusetts, of his desire to make such purchase and shall specify in such writing the number of units that he desires to purchase within his said quota and the number of units, if any, that he is willing to purchase in excess of his quota. Ninety days after the Trustees of the Endowment Trust have mailed notice to the heirs of the number of units of stock available for purchase, such Trustees shall allot the said units among those of the heirs who have so notified said Trustees of their intention to buy, and if any heir has not given notice of his intention to purchase his full quota, the remainder of his quota shall be al-

lotted to those desiring to purchase in excess of their quotas, pro rata according to the respective excess amounts requested by them. Upon receiving notice of allotment, each heir who has given notice of his desire to purchase shall make the first payment of one-third and receive delivery of the units so allotted to him in like manner as is provided above for original purchase of units under option.

(g) If any of the heirs shall be adjudicated bankrupt or adjudged insolvent or shall make a general assignment for [fol. 45] the benefit of creditors or if a receiver of his property shall be appointed and not discharged within thirty days, then all right of such heir to exercise any option not theretofore already exercised hereunder shall ipso facto terminate and such rights shall immediately vest in the other heirs in the relative proportions in which they are entitled to share with respect to each other in one-half of the "net residue" as hereinabove provided.

If, upon the final determination of the "net residue" and distribution thereof to the heirs as provided in paragraph Sixteenth hereof, it shall appear that any heir by the exercise of an option has purchased one or more units of stock to which he would have become entitled as a part of his share of one-half of said "net residue", then he shall be repaid in cash by the executors or Trustees of the Endowment Trust, as the case may be, the sum he has theretofore paid on account of the option purchase price of such unit or units together with interest thereon at the rate of 6% per annum from the date of such payment or payments made by him under such exercised option.

Nineteenth. Notwithstanding anything contained in paragraphs Fourteenth, Fifteenth, Sixteenth and Eighteenth hereof, the executors or the Trustees of the Endowment Trust may at any time and from time to time sell to any one or more of the heirs upon such price and terms as may be agreed upon between such executors or Trustees as the case [fol. 46] may be and such heir or heirs any number of said units of stock not distributed or distributable to the heirs under paragraphs Fifteenth and Sixteenth hereof; provided, however, that all heirs shall be given a reasonable opportunity to participate pro rata in such purchase.

Twentieth. The executors and the Trustees of Longyear Foundation agree with respect to any tangible personal

property listed in said appraisal by J. Robert Boomer which the Trustees of Longyear Foundation do not intend to retain and use for the purposes of said Longyear Foundation that any heir may buy any part or all of the same at the valuations thereof set forth in said appraisal by J. Robert Boomer. Applications to purchase shall be made in writing to the executors and the said Trustees within six months from the effective date of this agreement and at the expiration of said six months period they shall sell such property to such heir applying therefor and if more than one heir shall apply for the same article, the right to purchase it shall be determined by lot; and the executors and the said Trustees agree that all letters, family photographs and portraits, writings, documents and other papers not listed in said inventory and not having an historical or business value for the purposes of said Longyear Foundation or other value in carrying out said purposes shall be delivered to the heirs at the expiration of said thirteen months period.

Twenty-first. All rights of every nature given in this agreement to an heir whether individually or jointly with [fol. 47] others are given to him and to his heirs, executors, administrators and assigns, (except as expressly limited by sub-paragraph (g) of paragraph Eighteenth) all of whom are intended to be included in each reference to an heir in this agreement. All rights of every nature herein given to the Trustees of Longyear Foundation or to the Trustees of the Endowment Trust are given to them and to their successors in trust. All obligations of any of the parties hereto under the terms of this agreement shall bind them and their respective heirs, executors, administrators, successors and assigns, but agreements and obligations of parties signing as executors, guardians, or trustees shall be binding upon such parties only as such executors, guardians, and trustees and such parties shall be liable hereunder only to the extent of the property in their respective possession in such fiduciary capacities.

Twenty-second. Reference in this agreement to the executors of the decedent or of her will or estate shall include those who shall be the executors of said will or administrators with the said will annexed for the time being in office, whether those named in this Compromise Agreement or others and whether one or more.

Twenty-third. All parties hereto expressly release the estate of the decedent from all claims and demands except their respective rights and interests under this Compromise Agreement or under said will as modified by this Compromise Agreement, it being understood and agreed, how-
[fol. 48] ever, that such releases shall not be operative nor shall this Compromise Agreement become effective and binding until the will, as so modified, has been allowed by said Probate Court for Norfolk County and this agreement of compromise has been confirmed. The heirs release the Trustees of Longyear Foundation, the Trustees of the Endowment Trust, and the Trustees of Zion Research Foundation separately and collectively from all claims and demands against them as such trustees, except such claims and demands as they may have in accordance with the provisions of this agreement and of said will as hereby modified.

Twenty-fourth. The parties hereto agree to waive all rights of appeal from any order or decree approving and confirming this Compromise Agreement, and this agreement shall be effective and binding when approved and confirmed as a whole by said Probate Court of Norfolk County.

Twenty-fifth. Any party named in this agreement may become a party hereto by signing a copy hereof, and any copy hereof signed by one or more of the parties shall when taken together with any other copy or copies bearing the signatures of all the other parties constitute an original agreement.

[fol. 49] In Witness Whereof the parties have hereunto set their hands and seals as of the 26th day of April, 1932.

The First National Bank of Boston	(Seal of Bank)
(Seal) By Olaf Olsen Vice President	As they are Executors named in the will of Mary B. Longyear dated December 7, 1928.
(Seal) Smith Johnson	
(Seal) Howard N. Pease	
(Seal) R. Howard Cooley	As they are Trustees of Longyear Foundation under an Indenture dated April 5, 1926, as amended as aforesaid.
(Seal) A. Marguerite Smith	
(Seal) Madie R. Knox	

The First National Bank of Boston
(Seal) By Olaf Olsen, Vice President
(Seal) Frederick P. Burrall

(Seal of Bank)
As they are Trustees of the so-called "Endowment Trust" under an indenture dated April 5, 1926, as amended as aforesaid.

(Seal) Howard N. Pease
(Seal) Kenneth B. Bond
(Seal) William R. Knox

As they are the Board of Visitors of Longyear Foundation under a declaration of Trust dated April 5, 1926, as amended as aforesaid.

(Seal) Joseph E. Warner, Attorney General of the Commonwealth
(Seal) Abby Beecher Roberts
(Seal) Helen Longyear Paul
(Seal) John M. Longyear
(Seal) Robert D. Longyear

[fol. 50] On behalf of J. M. Richardson Lyeth, Jr. and Munro Longyear Lyeth, minor sons of the late Judith Longyear Lyeth, I hereby approve of the terms and conditions of the foregoing Compromise Agreement.

William H. Best, Guardian ad Litem of J. M. Richardson Lyeth, Jr. and Munro Longyear Lyeth, Minor Sons of the Late Judith Longyear Lyeth.

[fol. 51] EXHIBIT "E" TO COMPLAINT

I, Mary Beecher Longyear, of Brookline, in the County of Norfolk and Commonwealth of Massa—setts, declare this to be my last will and testament, hereby revoking any will by me at any time heretofore made.

Item 1. I nominate and appoint Smith Johnson of Brookline, Massachusetts, Howard N. Pease of Milton, Massachusetts, and The First National Bank of Boston, Massachusetts, to be the executors of this will and request that no surety be required on the official bond of them or any of them. In case of any vacancies in the offices of the individual executors, I direct that such vacancies be filled by the appointment of my sons, Robert Longyear and John M. Longyear, in the order named, without surety, otherwise no successor need be appointed.

Item 2. I give and devise to the trustees under a certain declaration of trust entitled "Assignment and Declaration of Trust, Longyear Foundation," dated April 5, 1926, (hereinafter in this will called the Longyear Foundation) my house and the land around it enclosed by the stone wall, and all the other buildings situated on the said land, to be held by said trustees for the purposes of said trust and for the further purpose of using the stone house thereon now occupied by me as an Historical Building for the paintings and my historical collection. It is expected that the said trustees will always have a competent number of servants to keep the house and grounds in perfect condition. For the purpose [fol. 52] of defining the metes and bounds of the premises above described, the executors or a majority of them are authorized and empowered to execute and deliver to said Longyear Foundation a deed of said property and the metes and bounds in such deed described shall be a conclusive determination of the metes and bounds of the property hereby devised.

Item 3. I give, devise and bequeath to the Longyear Foundation the houses formerly owned or occupied by Mary Baker Eddy situated in the towns of Groton and Rumney in the State of New Hampshire and in the towns of Swampscott and Amesbury in the Commonwealth of Massachusetts, and the parcels of land upon which said houses are located, together with so much of the land owned by me and situated in said towns or any of them as may in the opinion of my said executors be reasonably necessary for the proper preservation of said houses as historical monuments, and also any other houses wherever situated owned by me at the time of my passing on and formerly owned or occupied by said Mary Baker Eddy, and any parcel of land upon which such house or houses so owned or occupied may stand, or which may be reasonably necessary in the opinion of my executors for the proper preservation of such house or houses as historical monuments, unless I have conveyed said houses and lands to said Longyear Foundation during my life; also all my books, manuscripts, and historical data relating to Mary Baker Eddy or to the history or teaching of Christian Science, pictures of Mary Baker Eddy and [fol. 53] other persons connected with the teaching of the doctrine of Christian Science and pictures of places con-

nected with such teaching, and copyrights of all the portraits of Mary Baker Eddy made by Max Bohm, and all plates made from said portraits or any of them by the Medici Society and all prints made or that may be made from said plates, to be held and administered by said Longyear Foundation for the purposes of said trust. I trust that said houses formerly occupied by said Mary Baker Eddy and referred to in this item of my will will never be sold by said Longyear Foundation but that said houses and the furniture therein be at all times maintained in good condition and repair, and that the same be managed and administered in accordance with the terms of said trust. For the purpose of determining the real estate hereby devised, the executors or a majority of them are authorized and empowered to execute and deliver to said Longyear Foundation such deed or deeds of said real estate as they deem advisable, and the real estate described in such deeds shall be thereby conclusively determined as the real estate hereby devised.

Item 4. I authorize and direct my executors to pay over to the Longyear Foundation such sums from time to time as may be reasonably necessary to enable the Longyear Foundation to meet its expenses and carry out its purposes until such time as the residue of my estate can be paid over to the residuary legatee as hereinafter provided.

Item 5. I give and bequeath to my grandson, Richardson Lyeth, when he reaches the age of 20 years, the portrait [fol. 54] by Seymour Thomas of my daughter Judith, his mother, and I give and bequeath to my grandson, Munro Lyeth, when he reaches the age of 21 years, the portrait by Dixey of said Judith, his mother said portraits to be kept in the meantime by their father, J. M. Richardson Lyeth.

Item 6. I give and bequeath to my son, Robert Longyear, the portrait of himself.

Item 7. I give and bequeath to my daughter, Abby Roberts, the portrait of her and the portraits of her grandfather Longyear.

Item 8. I give and bequeath to my daughter, Helen Longyear Paul, the portrait of her and also the portraits of myself and of my late husband, John M. Longyear by Max Bohm.

Item 9. I give and bequeath to my son, John M. Longyear, the portrait of himself.

Item 10. I give and bequeath to my daughter-in-law, Isabel Longyear, the collection of prints of "Cries of London" and the picture by Moroni.

Item 11. I give and bequeath to my sister-in-law, Ida Longyear, such article of my jewelry as she may select and also such pictures as she may select from the pictures which have not been otherwise specifically disposed of in this will.

Item 12. I give and bequeath to each of my children such of the oil and water color paintings by me as they may select, [fol. 55] the order of choice to be determined by lot.

Item 13. I give and bequeath to the Longyear Foundation all other portraits and pictures not otherwise hereinbefore disposed of by this will, the panels of Bohm in the music room, the long tables in the sitting room and library, the Chinese table, the Egyptian figures and Greek vases and all other furnishings of the house referred to in Item 2 above not otherwise disposed of by this will.

Item 14. I give and bequeath to each of my children three of my rugs to be selected by them, the order of choice to be determined by lot, and thereafter to each of my grandchildren (including my daughter Helen's adopted children) one rug to be selected by them in the same manner.

Item 15. I give and bequeath to my son, Robert Longyear, all my old English silver.

Item 16. I give and bequeath to my daughter, Helen Longyear Paul, all my Norwegian silver.

Item 17. I give and bequeath to my daughter, Abby Roberts the choice of two extra rugs to be selected by her after the selections have been made under Item 14 above, and the sum of Five Thousand Dollars ($5,000.).

Item 18. I give and bequeath to my son, John M. Langyear, all the books in the library which he wishes to have, except such as are disposed of by Item 3 above, and the sum [fol. 56] of Ten Thousand Dollars ($10,000.).

Item 19. I give and bequeath to The First National Bank of Boston the sum of Ten Thousand Dollars ($10,000.) in

trust to pay the net income therefrom to my grandson, John M. Longyear, Jr., until he shall reach the age of twenty-one years and then to pay over the entire trust fund free and discharged from all trusts.

Item 20. I give and bequeath to each of my grandchildren other than John M. Longyear, Jr. (including my daughter Helen's adopted children) Five Thousand Dollars ($5,000.) apiece, requesting their respective parents or guardians to put said sum in a savings bank or invest it until the said grandchildren respectively attain the age of twenty-one years but imposing on them no legal obligations so to do.

Item 21. I give and bequeath to each of my sisters, Caroline Silva, Alice Munro and Abby Beecher Abbott, and to my brother, Bryant Beecher, the sum of Ten Thousand Dollars ($10,000.).

Item 22. I give and bequeath to The First National Bank of Boston the sum of Ninety Thousand Dollars ($90,000.) in trust to pay the net income therefrom in equal shares to my sisters Caroline Silva, Alice Munro and Abby Beecher Abbott during their respective lives and upon the death of each to pay over to her issue free and discharged from all trusts [fol. 57] her pro rata share of the principal of the trust fund or if she leaves no issue to pay over her share free and discharged from all trust to such person or persons as she may by will or other instrument in writing appoint and in default of appointment then as provided in the residuary clause of this will.

Item 23. I give and bequeath to my nephew, Frederick P. Burrall, Five Thousand Dollars ($5,000.); to Harry Burrall now of Albuquerque, New Mexico, Five Thousand Dollars ($5,000.); to my niece, Grace Tibbitts, now of St. Louis, Missouri, Two Thousand Dollars ($2,000.).

Item 24. I give and bequeath to Wilbur Dubois, John Longyear, now of Lansing, Michigan, a cousin of my late husband, Elmer Turner, Mrs. Frank Dodge, Horace Munro, Mrs. Horton Longyear, Eva Black, Frank Longyear, Five Thousand Dollars ($5,000.) each.

Item 25. I give and bequeath to Beulah W. Hughes and A. Marguerite Smith the sum of Five Thousand Dollars ($5,000.) each.

Item 26. I give and bequeath to Smith Johnson Three Thousand Dollars ($3,000.); to Mrs. Ruth Starr, Two Thousand Dollars ($2,000.); to Hope Horton, One Thousand Dollars ($1,000.); to James Bonner, One Thousand — ($1,000.) and to Emma Edenborg, One Thousand Dollars ($1,000.) provided, however, in each case that the legatee is in my employ at the time of my passing on.

Item 27. I give and bequeath to each of the servants employed by me for one year or over at the time of my passing [fol. 58] on and working inside or outside on the residence and to whom no gift has heretofore been made the sum of One Hundred and Fifty Dollars ($150.) for each year they have been so employed but the legacy to any one such person shall not exceed Two Thousand Dollars ($2,000.).

Item 28. I give and bequeath to my daughter, Helen Longyear Paul, the sum of Two Thousand Dollars ($2,000.), I having full confidence that she will dispose of it in accordance with any memorandum I may leave or, failing such memorandum, in accordance with any wishes I may have expressed during my life but I impose on her no legal obligation so to do.

Item 29. I give and bequeath also to my daughter, Helen Longyear Paul, all my wearing apparel and jewelry not otherwise disposed of in this will, I having full confidence that she will dispose of it in accordance with any memorandum I may leave or, failing such memorandum, in accordance with any wishes that I may have expressed during my life and that she will give to each relative of mine or of my late husband, John M. Longyear, for whom no provision has been made in this will such article as she may select, but I impose on her no legal obligation so to dispose of any of the property given to her by this item.

Item 30. I give and bequeath to the Historical Library of the Upper Peninsula, situated in Marquette, Michigan, if my personal estate is sufficient to warrant it after providing [fol. 59] for all the other bequests, the sum of Twenty-Five Thousand Dollars ($25,000.) to be applied toward the cost of the erection of a building by said Historical Library, provided that said building shall be used in part for the preservation and display of the historical collection made by my late husband, John M. Longyear and named after him.

Item 31. I give, devise, bequeath and appoint all the rest, residue and remainder of my property of whatsoever nature and wheresoever situate to which I am now or hereafter may be legally or equitably entitled, or over which I may have any power of appointment, to the trustees under the trust instrument entitled "Assignment and Declaration of Trust" dated April 5, 1926, executed by and between me, of the one part, and the said Frederick P. Burrall and said The First National Bank of Boston, of the other part, for the use and benefit of the Longyear Foundation as therein provided.

Item 32. I direct that all legacy, succession, estate and like taxes be charged against and paid out of my residuary estate.

Item 33. I make no other or further provision of any of my children or grandchildren as they are amply provided for.

Item 34. The words "executors" wherever used in this will shall be construed to include the executors for the time being hereof and their successors.

[fol. 60] Item 35. I direct that as far as is reasonably possible no one be permitted to see my body after I pass on, that my body be cremated and that my ashes be thrown away with no formal services or gathering of relatives.

Item 36. Inasmuch as my executors may find it desirable to organize a corporation to take over the whole or any part of the property to which I am or have become entitled or in which I have an interest under the will of my late husband, John M. Longyear, or to sell such property or any part thereof to some corporation either already existing or organized to purchase the same, they are authorized on behalf of my estate to subscribe for, take and hold shares in any such corporation to such amount and upon such terms as they shall deem wise, having in view the interests of my estate, and to convey all or any of such property to such corporation, at such prices and upon such terms as they see fit and take in payment shares to such extent as they see fit, and in such case the shares of such corporation shall be disposed of by them as a part of my residuary estate.

Item 37. If it should become necessary to probate this will in any state where it is not possible or convenient for

said The First National Bank of Boston to qualify as executor and/or trustee hereunder, then I appoint Olaf Olsen, if he is then an officer of said Bank, to be the executor and/or trustee hereunder in place of said Bank in such state, but if he is not then such an officer or in the event of his [fol. 61] declination, resignation, decease or inability for any other reason so to act, then I nominate and appoint such person as may be designated by the president of said Bank to be such executor and/or trustee in place of said Bank in such state, and I direct that any person appointed under the provisions of this paragraph shall not be required to furnish any surety on his official bond.

In Witness Whereof I have hereunto set my hand and seal at Boston this Seventh day of December, 1928.

Mary Beecher Longyear. (Seal.)

Signed, sealed, published and declared by the said Mary Beecher Longyear as and for her last will and testament, in the presence of us who, at her request, in her presence and in the presence of each other have hereunto subscribed our names as witnesses the day and year last above written.

George S. Fuller, West Newton, Mass.
Harry W. Bond, Braintree, Mass.
Ronald D. Birch, Newton, Mass.

Norfolk County.

A true copy. Attest:

—— ——, Assistant Register.

[fol. 62] Exhibit "F" to Complaint

Probate Court

Commonwealth of Massachusetts,
Norfolk, ss:

At a Probate Court holden at Dedham in and for said County of Norfolk, on the twenty-sixth day of April in the year of our Lord one thousand nine hundred and thirty-two.

On the petition of The First National Bank of Boston, Smith Johnson, And Howard N. Pease, Executors praying that the instrument therewith presented, purporting to be the last will and testament of Mary Beecher Longyear late

of Brookline in said County of Norfolk, deceased, may be proved and allowed, and letters testamentary issued to them, the executors therein named, without giving surety on their bond, the heirs-at-law, next of kin, and all other persons interested, having been notified according to the order of the Court to appear and show cause, if any they have, against the same, objection having been made thereto, and, on petition, the Court having given authority to the persons named as executors to adjust by compromise certain controversies between the persons who claim as devisees and legatees under said instrument and the persons who would be entitled to the estates of the deceased had she died intestate, and a compromise having been made according to a written agreement entered into by the parties in interest, which agreement is on file and has been authorized and approved by this Court:

[fol. 63] Now, after hearing, it appearing that all parties interested have consented to the allowance of the said instrument presented for probate as the last will of the deceased, it is hereby ordered and decreed that said instrument so presented for probate be proved and allowed as the last will of said deceased, that letters testamentary be issued to said petitioners, they being competent persons to be appointed to that trust, they first giving bond without sureties for the due performance of said trust, and that they be directed to administer the estate of said deceased in accordance with the terms of said will and said agreement of compromise.

Joseph R. McCoole, Judge of Probate Court.

[fol. 64] In United States District Court

[Title omitted]

Order Amending Complaint

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the complaint herein be deemed amended so that the second sentence of paragraph "Fifth" thereof shall read as follows:

"Thereafter and within the time provided by law the Commissioner made an assessment against the plaintiff for

the amount of said deficiency of $56,389.65, together with interest thereon in the sum of $8,613.03, totalling $65,005.68."

Dated, New York, N. Y., February 6th, 1937.

Carter, Ledyard & Milburn, Attorneys for Plaintiff. Lamar Hardy, United States Attorney, Attorney for Defendant.

So ordered, 3/6/37. Hulbert, U. S. D. J.

[fol. 65] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER

The defendant above named, by his attorney Lamar Hardy, United States Attorney for the Southern District of New York, for his answer to the complaint herein:

1. Admits that upon a review and audit of the individual income tax return filed by the plaintiff for the calendar year 1933 the Commissioner of Internal Revenue added to the income reported by the plaintiff in the said return the sum of $141,484.03, which amount was claimed by the Commissioner to be taxable income received by the plaintiff during the calendar year 1933 as a result of a transaction between various parties, including the plaintiff, and relating to the estate of the plaintiff's grandmother, Mary Beecher Longyear, late of Brookline, Massachusetts; and, except as thus expressly admitted, denies each and every allegation contained in paragraph "Fourth" of the complaint.

2. Admits the allegations in paragraph "Eighth" of the complaint except the allegations relating to the provisions [fol. 66] in the will of said Mary Beecher Longyear, and, with respect to the latter allegations, respectfully refers the Court to the said will, a copy of which is marked "Exhibit E" and is annexed to the complaint.

3. Admits that objections to the probate of the said will were filed, that a motion was made before the Probate Court of Norfolk County, Massachusetts, to frame jury issues, a copy of the said motion being annexed hereto and made a

part hereof and marked "Exhibit 1", and, except as thus expressly admitted, denies that he has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "Ninth" of the complaint.

4. Admits that a compromise agreement dated April 26, 1932, was made by the plaintiff and others, as more fully appears from the copy of the said agreement marked "Exhibit D" and annexed to the complaint, that the said agreement was filed and approved by the said Probate Court, and that on April 26, 1932, a decree was duly entered in the said Court admitting the said will to probate, a copy of the said decree being marked "Exhibit F" and annexed to the complaint; and, except as thus expressly admitted, denies on information and belief each and every allegation contained in paragraph "Eleventh" of the complaint respectfully referring the Court to the provisions of the exhibits annexed thereto.

5. Denies on information and belief that the property mentioned in paragraph "Twelfth" of the complaint was [fol. 67] distributed to the plaintiff as part of the estate of the said Mary Beecher Longyear, and denies on information and belief that the said property was so distributed under the direction of the said Probate Court as alleged in the said paragraph, but admits that the plaintiff received the said property pursuant to the provisions of the said compromise agreement dated April 26, 1932, a copy of which is annexed to the complaint as "Exhibit D."

6. Denies that he has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "Thirteenth" of the complaint.

7. Denies on information and belief each and every allegation contained in paragraph "Fourteenth" of the complaint.

8. Denies each and every allegation contained in paragraphs "Fifteenth" and "Sixteenth" of the complaint.

9. Denies on information and belief each and every allegation contained in paragraph "Seventeenth" of the complaint.

10. Admits that no part of the said amount of $65,005.68 has been refunded, credited or paid back to the plaintiff, and that the same has been duly demanded, and, except as thus

expressly admitted, denies each and every allegation contained in paragraph "Eighteenth" of the complaint.

[fol. 68] 11. Denies each and every allegation contained in paragraph "Nineteenth" of the complaint.

For a set-off and recoupment alleges:

12. That the defendant covered into the Treasury pursuant to law the $65,005.68 mentioned in paragraph "Sixth" of the complaint and paid to him by the plaintiff.

13. That the defendant in demanding payment of the said sum of $65,005.68 and in receiving payment of the said sum as alleged in paragraphs "Fifth" and "Sixth" of the complaint acted under the directions of the proper officer of the Government and had probable cause for doing the said acts and will be entitled to a certificate to this effect under Section 842 of Title 28 of the United States Code upon the entry of any judgment against him in this case.

14. That this suit is in substance a claim against the United States.

15. On information and belief, that the executors of the estate of plaintiff's grandmother, Mary Beecher Longyear, did not include the property, or any part thereof, transferred and conveyed to the said heirs pursuant to the compromise agreement mentioned in paragraph "Eleventh" of the complaint, as part of the net estate in the estate tax return filed by the executors under the estate tax laws of the United States.

16. On information and belief, that no Federal estate tax has been paid on the $141,484.03 transferred and conveyed [fol. 69] to the plaintiff under the said compromise agreement or upon any of the other property conveyed to any of the other heirs under the said compromise agreement.

17. On information and belief, that the said estate has been fully distributed by the executors thereof.

18. On information and belief, that on October 16, 1936, when the plaintiff paid to the defendant the sum of $65,005.68 as mentioned in paragraph "Sixth" of the complaint, there was due and owing from the estate to the United States a Federal estate tax in excess of $65,005.68.

Wherefore, the defendant demands judgment against the plaintiff dismissing the complaint, together with the costs and disbursements of this action.

Lamar Hardy, United States Attorney for the Southern District of New York Attorney for Defendant, Office and Post Office Address, United States Court House, Foley Square, Borough of Manhattan, City of New York.

[fol. 70] EXHIBIT 1 TO ANSWER

PROBATE COURT

COMMONWEALTH OF MASSACHUSETTS,
Norfolk, ss:

Estate of MARY BEECHER LONGYEAR

MOTION TO FRAME ISSUES FOR JURY TRIAL

Now comes the contestants and (without waiving their right to question the due execution of the alleged will) move the Court that the following issues of fact, arising upon the petition for the probate of a certain instrument as the last will of Mary Beecher Longyear, late of Brookline, said County of Norfolk, deceased, be framed for trial by a jury, viz.:

1. Was the said Mary Beecher Longyear at the time of the execution of the said alleged will of sound mind?

2. Was the execution of said alleged will of said Mary Beecher Longyear, procured by the fraud or undue influence of John V. Dittemore and A. A. Beauchamp or either of them, exercised upon the said Mary Beecher Longyear?

3. Was the will propounded for probate as the last will of said Mary Beecher Longyear procured to be made in whole or in part by the fraud or undue influence of John V. Dittemore and A. A. Beauchamp or either of them, exercised upon [fol. 71] the said Mary Beecher Longyear, and if in part what part?

J. M. Richardson Lyeth, Jr. and Munro Longyear Lyeth, by Their Guardian ad Litem William H. Best, and Abby Longyear Roberts and Helen Longyear Paul, by Samuel Hoar, Kenneth D. Johnson, Their Attorneys.

In United States District Court

[Title omitted]

Reply to Set-Off and Recoupment

The plaintiff for his reply to the set-off and recoupment contained in the answer of the defendant herein alleges:

First. Plaintiff denies upon information and belief each and every allegation set forth in the paragraph of the answer numbered 14.

Second. Upon information and belief the plaintiff denies each and every allegation of the paragraph numbered 15, [fol. 72] and alleges upon information and belief that all of the property belonging to the Estate of Mary Beecher Longyear was included in the federal estate tax return filed by the executors of said estate, but that the value of the property bequeathed to the charitable trusts by the will was deducted from the gross estate and that the value of the property transferred and conveyed to the heirs of said Mary Beecher Longyear, pursuant to the compromise agreement referred to in the complaint, was not included in the net estate for tax.

Third. Upon information and belief the plaintiff denies each and every allegation of the paragraph numbered 16 and alleges upon information and belief that no federal estate tax was due and payable upon any specific distribution, transfer, or conveyance made by the executors, but only on the amount of the entire net estate prior to its distribution, and that all of the estate tax, which was determined by the Bureau of Internal Revenue to be due from said estate, after the consideration of all the facts and after including all the items in the gross estate, was duly paid.

Fourth. Plaintiff denies each and every allegation contained in the paragraph of the answer numbered 18.

For a first defense to the set-off and recoupment plaintiff alleges on information and belief:

Fifth. That the federal estate tax return (Form 706) for the said Estate of Mary Beecher Longyear was filed with the [fol. 73] Collector of Internal Revenue at Boston, Massachusetts, on November 22, 1933; that no notice of deficiency

was issued and the amount of the tax shown by the return was accepted by the Commissioner of Internal Revenue as is shown by the copy of a letter from the Deputy Commissioner dated July 24, 1933, hereto annexed and marked Exhibit "A."

Sixth. That this action was not commenced and said set-off and recoupment was not filed or served until after the expiration of four years from the filing of said federal estate tax return, and the claim asserted in said set-off and recoupment is barred by the statute of limitation.

For a second defense to the said set-off and recoupment, plaintiff alleges upon information and belief:

Seventh. That the claim of set-off now asserted by the defendant against the plaintiff is not based upon any liability due from plaintiff as a taxpayer, but is alleged to arise from the distribution made to plaintiff by the executors of the said estate of Mary Beecher Longyear; that no such liability was ever determined or asserted against said executors within the applicable period of limitations or at any time since; that the Bureau of Internal Revenue expressly determined under date of July 24, 1933 that there was no deficiency in the federal estate tax due from said executors and said determination never has been reversed; and that, accordingly, no liability exists against [fol. 74] plaintiff to pay an alleged liability against the executors which has never been assessed, determined, or claimed.

Eighth. That this suit is a claim against the defendant individually for money unlawfully had and received; and that the defendant is not entitled to set off in this suit the amount of a deficiency alleged to be due from a third party to the United States.

For a third defense to the said set-off and recoupment, plaintiff alleges upon information and belief:

Ninth. That the Bureau of Internal Revenue received a copy of the compromise agreement referred to in the complaint and answer herein and made the claim in the year 1933 which is set forth in the said set-off and recoupment, viz. that the federal estate tax should be computed on the basis of the will as modified by the compromise agreement.

A brief on this question was prepared and submitted by the attorneys for the executors and conferences were had with the Bureau and with the General Counsel of the Bureau. Thereafter, and on or about July 24, 1933, the Acting Deputy Commissioner of Internal Revenue duly notified The First National Bank of Boston as Executor of the said Estate of Mary Beecher Longyear that there was no deficiency in the estate tax. A copy of such letter of notification is hereto annexed and marked Exhibit "A."

Tenth. The attorneys for the executors notified the Bu- [fol. 75] reau that it was most important that the federal estate tax liability of the estate be audited and finally fixed, as the compromise agreement as amended by an agreement dated May 1, 1933 could not be carried out unless and until the federal estate tax be finally fixed substantially as set forth in the return. Accordingly, the Bureau agreed to and did determine on July 24, 1933 the legal question whether the federal estate tax should be assessed in reference to the will as originally written or in reference to the will as modified by the compromise agreement, before considering the values of the property transferred to the heirs pursuant to the will as modified by the compromise agreement. In reliance upon the final determination of the Commissioner of Internal Revenue, after full knowledge of all the facts and consideration of the legal questions involved, that no additional federal estate tax was due, the executors distributed the estate pursuant to the order of the Probate Court in accordance with the provisions of the will as modified by said compromise agreement. Under the terms of the compromise agreement the federal estate tax had to be paid or a sufficient amount to pay it retained by the executors, before the equal division of the net residue between the residuary legatee and the heirs was made, and thereby the residuary legatee bore one-half of the federal estate tax. If the set-off and recoupment should be allowed plaintiff could not recover one-half of the federal estate tax from the residuary legatee and plaintiff could not recover proportionate contributions from the other heirs, except plaintiff's brother, who have filed petitions in the Board of Tax Appeals.

[fol. 76] Eleventh. The United States and defendant are estopped from asserting said set-off and recoupment.

For a fourth defense to the said set-off and recoupment plaintiff alleges upon information and belief:

Twelfth. Plaintiff realleges each and every allegation contained in the Fifth, Sixth, Ninth and Tenth paragraphs hereof.

Thirteenth. The defendant and the United States are barred by laches from asserting the said set-off and recoupment.

Wherefore plaintiff demands judgment against the defendant in the sum of $65,005.68 with interest thereon from October 16, 1936, together with the costs of this action.

Carter, Ledyard & Milburn, Attorneys for Plaintiff, Office and P. O. Address, No. 2 Wall Street, Borough of Manhattan, City of New York.

[fol. 77] *Duly sworn to by J. M. Richardson Lyeth. Jurat omitted in printing.*

[fol. 78] EXHIBIT A TO REPLY TO SET-OFF AND RECOUPMENT

TREASURY DEPARTMENT, WASHINGTON

(Seal)

Jul. 24, 1933.

Office of Commissioner of Internal Revenue

Address Reply to Commissioner of Internal Revenue and refer to MT-ET-9609-EYD.

District of Massachusetts.
Estate of Mary Beecher Longyear.,
Date of death—March 14, 1931.

The First National Bank of Boston, Executor, Estate of Mary Beecher Longyear, Boston, Massachusetts.

SIRS:

A final audit of the estate tax return, Form 706 in connection with supplemental data filed for the above-named estate, discloses:

(1) Estate tax shown on the return $1,202.94.

(2) Estate tax finally determined, $1,202.94. Accordingly, there is no deficiency in this case.

Respectfully, Adelbert Christy, Acting Deputy Commissioner.

hec.

[fol. 79] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED ANSWER

The defendant above named, by his attorney Lamar Hardy, United States Attorney for the Southern District of New York, for his amended answer to the complaint herein:

1. Admits that upon a review and audit of the individual income tax return filed by the plaintiff for the calendar year 1933 the Commissioner of Internal Revenue added to the income reported by the plaintiff in the said return the sum of $141,434.03, which amount was claimed by the Commissioner to be taxable income received by the plaintiff during the calendar year 1933 as a result of a transaction between various parties, including the plaintiff, and relating to the estate of the plaintiff's grandmother, Mary Beecher Longyear, late of Brookline, Massachusetts; and, except as thus expressly admitted, denies each and every allegation contained in paragraph "Fourth" of the complaint.

2. Admits the allegations in paragraph "Eighth" of the complaint except the allegations relating to the pro-[fol. 80] visions in the will of said Mary Beecher Longyear, and, with respect to the latter allegations, respectfully refers the Court to the said will, a copy of which is marked "Exhibit E" and is annexed to the complaint.

3. Admits that objections to the probate of the said will were filed, that a motion was made before the Probate Court of Norfolk County, Massachusetts, to frame jury issues, a copy of the said motion being annexed hereto and made a part hereof and marked "Exhibit 1," and, except as thus expressly admitted, denies that he has any knowledge or

information sufficient to form a belief as to the truth of the allegations contained in paragraph "Ninth" of the complaint.

4. Admits that a compromise agreement dated April 26, 1932, was made by the plaintiff and others, as more fully appears from the copy of the said agreement marked "Exhibit D" and annexed to the complaint, that the said agreement was filed and approved by the said Probate Court, and that on April 26, 1932 a decree was duly entered in the said Court admitting the said will to probate, a copy of the said degree being marked "Exhibit F" and annexed to the complaint; and, except as thus expressly admitted, denies on information and belief each and every allegation contained in paragraph "Eleventh" of the complaint, respectfully referring the Court to the provisions of the exhibits annexed thereto.

5. Denies on information and belief that the property [fol. 81] mentioned in paragraph "Twelfth" of the complaint was distributed to the plaintiff as part of the estate of the said Mary Beecher Longyear, and denies on information and belief that the said property was so distributed under the direction of the said Probate Court as alleged in the said paragraph, but admits that the plaintiff received the said property pursuant to the provisions of the said compromise agreement dated April 26, 1932, a copy of which is annexed to the complaint as "Exhibit D."

6. Denies that he has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "Thirteenth" of the complaint.

7. Denies on information and belief each and every allegation contained in paragraph "Fourteenth" of the complaint.

8. Denies each and every allegation contained in paragraphs "Fifteenth" and "Sixteenth" of the complaint.

9. Denies on information and belief each and every allegation contained in paragraph "Seventeenth" of the complaint.

10. Admits that no part of the said amount of $65,005.68 has been refunded, credited or paid back to the plaintiff, and that the same has been duly demanded, and, except as

thus expressly admitted, denies each and every allegation contained in paragraph "Eighteenth" of the complaint.

[fol. 82] 11. Denies each and every allegation contained in paragraph "Nineteenth" of the complaint.

For a first affirmative defense, by way of set-off and recoupment alleges:

12. That the defendant covered into the Treasury pursuant to law the $65,005.68 mentioned in paragraph "Sixth" of the complaint and paid to him by the plaintiff.

13. That the defendant in demanding payment of the said sum of $65,005.68 and in receiving payment of the said sum as alleged in paragraphs "Fifth" and "Sixth" of the complaint acted under the directions of the proper officer of the Government and had probable cause for doing the said acts and will be entitled to a certificate to this effect under Section 842 of Title 28 of the United States Code upon the entry of any judgment against him in this case.

14. That this suit is in substance a claim against the United States.

15. That the cash in the amount of $61.03 and the certificate of deposit for 258 units under a deposit agreement dated April 20, 1928, referred to in paragraph "Twelfth" of plaintiff's complaint, represent the property secured by plaintiff under the compromise agreement referred to in paragraph "Eleventh" of the complaint over and above what was devised and bequeathed to plaintiff under the terms and provisions of the will of Mary B. Longyear, deceased, as written.

[fol. 83] 16. That the property aforesaid was inventoried as part of the estate of said Mary B. Longyear, deceased, and when the property of said estate was valued by the executors for estate tax purposes, the said units of stock were given a value of $250.00 per unit in the estate tax return.

17. That the executors named in said will filed an estate tax return for said estate on November 21, 1932, in which return there was taken as a deduction from the value of the gross estate the full returned value of all of the estate property that, under the terms and provisions of the will as writ-

ten, was devised and bequeathed to certain eleemosynary corporations.

18. That the deduction so taken included the returned value of the $61.03 in cash, and the said certificate of deposit that, as hereinbefore alleged, was received by plaintiff through and under the compromise agreement referred to above.

19. That by reason of the deduction so taken in the said estate tax return in determining the value of the net estate for estate tax purposes, the value of the property so received by the plaintiff under said compromise agreement, and the property similarly received by the other heirs, was not subjected to estate taxes, and no estate tax was paid on account thereof.

20. That if the value of the property so received by plaintiff under the compromise agreement aforesaid, and other property similarly situated, had not been claimed and [fol. 84] taken as a deduction from the value of the gross estate of the decedent for estate tax purposes, the estate tax would have been increased according to the returned value thereof in an amount not less than $53,178.50.

21. That on October 16, 1936, the estate of the decedent, Mary Beecher Longyear, had been fully distributed.

22. That on October 16, 1936, the time in which to assess an additional estate tax against the plaintiff as a transferee and distributee of the said estate had not expired.

23. That if the said property received by the plaintiff and other heirs under the said compromise agreement was not a proper deduction from the gross estate for purposes of the estate tax, the amount that was due and owing from the plaintiff to the United States as transferee and distributee on October 16, 1936, exceeded $65,005.68.

24. That under the aforesaid circumstances, plaintiff did not overpay his tax liability to the United States growing out of the receipt by him of property under the said compromise agreement, and that accordingly the money collected from him as set forth in paragraphs numbered "Fifth" and "Sixth" of the complaint, and now held in the Treasury of the United States, should not in equity and good conscience be returned to him.

[fol. 85] For a second affirmative defense, and by way of estoppel, alleges:

25. That on account of the facts hereinbefore alleged and in view of the fact that the executors of the estate of said decedent, for the benefit of and to the advantage of plaintiff, claimed and caused the deduction aforesaid to be allowed in the estate tax proceedings, under the contention that the property in question was devised and bequeathed by the will of Mary B. Longyear, deceased, to certain eleemosynary corporations, the plaintiff is now estopped to claim that the same identical property was devised or bequeathed to him by the said decedent or that he secured it by inheritance from the said decedent.

Wherefore, the defendant demands judgment against the plaintiff dismissing the complaint, together with the costs and disbursements of this action.

Lamar Hardy, United States Attorney for the Southern District of New York, Attorney for Defendant, Office and Post Office Address, United States Court House, Foley Square, Borough of Manhattan, City of New York.

[fol. 86] EXHIBIT 1 TO AMENDED ANSWER

PROBATE COURT

COMMONWEALTH OF MASSACHUSETTS,
Norfolk, ss:

Estate of MARY BEECHER LONGYEAR

MOTION TO FRAME ISSUES FOR JURY TRIAL

Now comes the contestants and (without waiving their right to question the due execution of the alleged will) move the Court that the following issues of fact, arising upon the petition for the probate of a certain instrument as the last will of Mary Beecher Longyear, late of Brookline, said County of Norfolk, deceased, be framed for trial by a jury, viz.:

1. Was the said Mary Beecher Longyear at the time of the execution of the said alleged will of sound mind?

2. Was the execution of said alleged will of said Mary Beecher Longyear, procured by the fraud or undue influence of John V. Dittemore and A. A. Beauchamp or either of them, exercised upon the said Mary Beecher Longyear?

3. Was the will propounded for probate as the last will of said Mary Beecher Longyear procured to be made in whole or in part by the fraud or undue influence of John V. Dittemore and A. A. Beauchamp or either of them, exer-
[fol. 87] cised upon the said Mary Beecher Longyear, and if in part what part?

J. M. Richardson Lyeth, Jr., and Munro Longyear, by their Guardian ad Litem William H. Best, and Abby Longyear Roberts and Helen Longyear Paul, by Samuel Hoar, Kenneth D. Johnson, Their Attorneys.

IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION FOR SUMMARY JUDGMENT

SIRS:

Please take notice that upon the complaint, the answer and the reply filed herein, and upon the annexed affidavit of J. M. Richardson Lyeth verified the 18th day of March, 1937, the annexed affidavit of George S. Fuller verified the 15th day of March, 1937, and the annexed affidavit of James
[fol. 88] S. Y. Ivins verified the 15th day of March, 1937, the undersigned will move this Court at a stated term thereof for motions to be held in Room 506 of the United States Court House, Foley Square, Borough of Manhattan, City of New York, on the 23rd day of March, 1937, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order striking out the answer of the defendant herein and directing that judgment be entered herein in favor of the plaintiff under the provisions of Rule 113 of the New York Rules of Civil Practice, on the ground that there is no defense to this action, and for such other and further relief as to the Court may seem just and proper.

Dated New York, March 18, 1937.

Carter, Ledyard & Milburn, Attorneys for the Plaintiff, Office and P. O. Address, 2 Wall Street, Borough of Manhattan, New York City.

To Lamar Hardy, Esq., United States Attorney for the Southern District of New York, Attorney for the Defendant, United States Court House, Foley Square, Borough of Manhattan, New York City.

[fol. 89] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF J. M. RICHARDSON LYETH, IN SUPPORT OF MOTION

STATE OF NEW YORK,
County of New York, ss:

J. M. Richardson Lyeth, being duly sworn, deposes and says:

1. That he is the father of the plaintiff and was appointed general guardian of the plaintiff by the probate court of Norfolk County, Commonwealth of Massachusetts, which was the court having jurisdiction of the Estate of Mary Beecher Longyear as set forth in the complaint herein. He is a member of the firm of Carter, Ledyard & Milburn, attorneys for the plaintiff and all the other heirs of Mary Beecher Longyear except Robert D. Longyear, and has charge of all matters relating to the alleged deficiencies assessed against said heirs for the year 1933. Deponent has knowledge of the facts relating to this suit.

2. This affidavit is made by deponent instead of by the plaintiff because plaintiff is not now within the State or [fol. 90] Southern District of New York and because plaintiff was a minor at the times of the events set forth in the complaint and had little personal knowledge thereof.

3. This action was commenced by the service of the summons and complaint upon the defendant on November 27, 1936. The defendant served his answer, by Lamar Hardy his attorney, on March 11, 1937. The plaintiff served his reply on March 16, 1937.

4. Deponent believes there is no defense to this action and that the answer of said defendant should be stricken out and judgment entered in favor of the plaintiff.

5. This action is brought to recover an overpayment of income taxes and interest thereon totalling $65,005.68 for

the year 1933 which plaintiff claims was collected illegally by the defendant, acting as Collector of Internal Revenue. Said taxes were assessed and collected from the plaintiff on the ground that certain property and cash of a total alleged value of $141,484.03, received by the plaintiff from the estate of plaintiff's grandmother, Mary Beecher Longyear late of Brookline, Massachusetts, as the result of the compromise of a contest of her will constituted taxable income.

6. Said Mary Beecher Longyear died March 14, 1931, a resident of Norfolk County, Massachusetts, leaving an estate which was inventoried by the temporary administrator [fol. 91] in an amount in excess of $3,000,000. An instrument dated December 7, 1928, purporting to be her last will and testament, copy of which is attached to the complaint and marked "Exhibit E" was offered for probate in said probate court of Norfolk County, Massachusetts, by the executors named therein. The heirs of said Mary B. Longyear were four living children, Abby Beecher Roberts, Helen Longyear Paul, Robert D. Longyear and John M. Longyear, Jr., and two grandchildren, plaintiff and his brother, J. M. Richardson Lyeth, Jr., who are sons of a deceased daughter of said Mary B. Longyear. The said alleged will purported to give to the plaintiff and his brother each a portrait of their mother, a rug, and $5,000 and it purported to give to the decedent's children certain rugs, portraits and other chattels, together with bequests of $10,000 and $5,000 respectively to two of the children. Except for these small bequests, the said alleged will purported to deprive the decedent's children and the plaintiff and his brother of all participation in the estate by providing that the entire residue, which was by far the greater part of the estate, should go to a charitable trust.

7. William H. Best of the law firm of Ropes, Gray, Boyden & Perkins of Boston, Massachusetts, was appointed by said probate court guardian ad litem for deponent's two sons, the plaintiff and J. M. Richardson Lyeth, Jr., both of whom at that time were minors. Samuel Hoar of the firm of Goodwin, Proctor & Hoar at Boston, appeared in the probate proceeding for Abby B. Roberts, Helen L. Paul and [fol. 92] plaintiff and his brother, objecting to the probate of the will on the grounds, among others, of lack of testamentary capacity and undue influence. Deponent is in-

formed and believes that Messrs. Barker, Davison & Shattuck appeared for Robert D. Longyear and John M. Longyear, Jr., objecting to the probate of the will.

8. A motion to frame jury issues was filed by said Samuel Hoar and, on June 30, 1931, said motion was heard before said probate court. The stenographer's minutes of said hearing, consisting of 177 pages, disclose that it occupied an entire day and that Mr. Hoar, on behalf of the contestants, stated in considerable detail what his evidence would be, including the reading of extensive excerpts from the diaries of the decedent, Mary B. Longyear. Said minutes also disclose that the attorney for the proponents likewise stated what his proofs would be and argued at considerable length that no case for the jury had been stated by Mr. Hoar for the contestants. After due consideration the said probate court granted said motion and entered an order framing jury issues. No appeal was taken by the proponents from said order.

9. Deponent is informed and believes that under the settled law of Massachusetts a probate court in granting a motion to frame jury issues must find that there is a "genuine question of fact supported by evidence of such substantial nature as to afford ground for reasonable expectation [fol. 93] of a result favorable to the party requesting the framing of issues". Smith v. Patterson, 286 Mass. 356 (1934). The following excerpt from the opinion of the Massachusetts Supreme Court in the recent case of Briggs v. Weston, Mass. Adv. Sh. (1936) 1161, states the rule very clearly:

"Issues for trial by jury on a petition for probate of a will are not to be framed in the Probate Court unless it appears from statements by counsel of expected evidence or otherwise that there is a 'genuine question of fact supported by evidence of such substantial nature as to afford ground for reasonable expectation of a result favorable to the party requesting the framing of issues'. Smith v. Patterson, 286 Mass. 356, 358. And on appeal this court reviews the entire case. But even where, as here, the case was heard on statements by counsel of expected evidence this court, by reason of the element of discretion involved, gives to the decision of the probate judge the weight to which it is entitled in the light of the whole record."

10. Entirely apart from the issues of testamentary capacity and undue influence involved in the contest of probate of the will, there were two serious legal questions involving the validity of the residuary bequest. In Item 31 of her will Mrs. Longyear bequeathed the residue of her estate "to the trustees under the trust instrument entitled 'Assignment and Declaration of Trust' dated April 5, 1926". A copy of [fol. 94] said trust instrument which is referred to in the compromise agreement as the "Endowment Trust", is hereto annexed and marked "Exhibit A". The income of said Endowment Trust was payable (paragraph h) to the trustees of another trust designated "Assignment and Declaration of Trust, Longyear Foundation", "unless and until the trust is revoked and terminated by me as hereinbefore provided, and unless and until I by request in writing signed by me and delivered to the trustees hereunder during my life shall order and direct some other disposition of the whole or any part of the net income of said trust (and I hereby expressly reserve the right so to do)". A copy of Section 2 of said "Assignment and Declaration of Trust, Longyear Foundation", which is referred to in the compromise agreement as "Longyear Foundation", setting forth the purposes of the trust, is hereto annexed and marked "Exhibit B". A copy of Section 33 thereof, reserving to Mrs. Longyear the power to alter, cancel, or amend the trust is hereto annexed and marked "Exhibit C".

11. Thus the entire residuary estate was left to the trustees of the Endowment Trust with directions that the income of the trust be paid to another set of trustees under the Longyear Foundation trust, the purposes of which were, in general, to preserve the records of the earthly life of Mary Baker Eddy, the founder of the Christian Science religion. Both of these assignments and declarations of trust could be altered, amended, or revoked by Mrs. Longyear by an in- [fol. 95] strument in writing, not testamentary in character, delivered to the respective trustees.

12. The first legal question resulting from the aforesaid facts was whether the residuary legacy was valid under the statute of wills and under the so-called doctrine of incorporation by reference, in that the testatrix reserved for herself the right to alter and amend the trust under which the residuary estate was given by an act not testamentary in character. In fact the testatrix actually did twice alter and

amend both of these trusts, once before (although this amendment was not referred to or incorporated by reference in the will) and once after the execution of her will on December 7, 1928. The Endowment Trust was altered and amended by an instrument signed and sealed by the testatrix on August 17, 1927 and again on December 12, 1928. The Longyear Foundation Trust was altered and amended by a written instrument signed and sealed by the testatrix on August 17, 1927 and again on December 11, 1928. The leading case on this subject is Atwood v. Rhode Island Hospital Trust Co., 275 Fed. 513 (C. C. A. 1, 1921).

13. The second legal question was whether the trusts created by said Assignments and Declarations of Trust, under the rule against perpetuities were valid as charitable or religious trusts. The primary purpose of the trusts was to preserve the records of the earthly life of Mary Baker Eddy, not to promote the religion of Christian Science.

[fol. 96] 14. Before the case was reached for trial, negotiations for settlement were had and deponent was informed that the residuary legatees were willing to settle the contest on the basis of disregarding the residuary bequest and making an equal division of the residuary estate between the heirs and the residuary legatee. Deponent was informed that the four living children were anxious to settle on this basis in order to avoid publicity and the unpleasantness of a trial. Said William H. Best, guardian ad litem for deponent's sons, stated to deponent that he could not take into consideration the avoidance of publicity. He discussed with deponent the said legal questions involving the validity of the residuary bequest which could not be raised until the heirs had been defeated on the contest and the will probated. He expressed considerable doubt whether he should accept the compromise on behalf of deponent's sons. He presented to deponent a well-considered memorandum on all the questions involved in the settlement and asked deponent's opinion, but deponent felt that, because of his personal relations, he could not give an unbiased opinion. After some delay, Mr. Best finally decided to accept his ward's share of one-half of the property bequeathed to the said trusts, in settlement.

15. The compromise agreement, a copy of which is attached to the complaint herein, was duly executed by the executors and the Attorney General of Massachusetts as

well as the residuary legatee and the heirs. The Probate Court approved the compromise agreement pursuant to the [fol. 97] Massachusetts compromise statute (Mass. G. L. 1932, Ch. 204, §§ 15-17), and entered a decree directing distribution of the estate "in accordance with the terms of said will and said agreement of compromise," a copy of which decree is attached to the complaint and marked "Exhibit F".

16. Thereafter, as a result of the economic depression, receipts and income of the estate were so curtailed that it was impossible for the executors to pay the pecuniary legacies under the will totaling approximately $300,000, which the compromise agreement provided should be paid before the residuary estate should be distributed. In order to facilitate the administration and distribution of the estate, the following plan was devised: The heirs formed a corporation, Longyear Heirs, Inc., and assigned to it all their interests in the estate of Mary B. Longyear, and succeeded in procuring from one half (in amount) of the pecuniary legatees which they undertook to solicit, releases of the legacies in exchange for preferred stock in such corporation. The heirs took common stock in the Corporation in proportion to their interests in the estate of said Mary B. Longyear and it was provided that no payments could be made to the common stockholders until all of the preferred stock had been retired at a premium with cumulative dividends. The Trustees of the Endowment Trust undertook to procure releases from the other half (in amount) of the pecuniary legatees or to furnish cash in the amount of legacies as to which releases were not obtained. Copies of the agreements [fol. 98] of May 1, 1933, one of which modified the said compromise agreement, consents, letters, etc., by which this plan was carried out, are hereto annexed and marked "Exhibit D". Deponent executed these agreements as general guardian of his two sons.

17. On or about July 26, 1933, the executors transferred to Longyear Heirs, Inc., as assignee of the heirs of said Mary B. Longyear, one half of the net residue of the estate, in accordance with the terms of the compromise agreement as modified by the agreement, copy of which is hereto annexed. The share of the plaintiff so assigned to Longyear Heirs, Inc. as assignee was $80.17 in cash and 358 units under a deposit agreement dated April 20, 1928 with the

National Park Bank of New York (now the Chase National Bank of the City of New York), each unit of which represented one share of stock of each of the following corporations: Longyear Estate, Inc., Longyear Corporation and Longyear Realty Corporation. These units and said cash were owned by Mary B. Longyear at the time of her death and were part of her estate.

In the Second Account of the First National Bank of Boston, Smith Johnson and Howard Pease, executors of the last will and testament of Mary B. Longyear (as compromised) for the period May 1, 1933 to July 26, 1933 filed in said probate court of Norfolk County, Massachusetts, appears the following:

"Distributive shares of tentative net residue as of May 26, 1933, under Article Fifteenth of Compromise Agreement [fol. 99] as modified by Agreement of May 1, 1938 (computed as per memorandum annexed $1,414,840.30)

Payment to Longyear Heirs, Inc., Assignee, pursuant to Agreement of May 1, 1933—As assignee of:

. . . . . .

Munro Longyear Lyeth 358 units	$141,423.00
Cash	80.17
	$141,503.17"

18. No property or money whatever was distributed or paid by the residuary legatees under the said will of Mary B. Longyear to deponent as guardian of plaintiff or to the plaintiff or to Longyear Heirs, Inc., for account of the plaintiff. All property and money delivered to Longyear Heirs, Inc., as aforesaid, was delivered to it directly by the said executors as shown in the aforesaid account and in accordance with the order of the said probate court, a copy of which is attached to the complaint and marked "Exhibit F".

19. The claim for federal estate tax liability of the executors of the estate of Mary Beecher Longyear set forth in the set-off and recoupment contained in the answer is barred by the statute of limitations. As appears from the affidavit of George S. Fuller, verified March 15, 1937, hereto annexed, the federal estate tax return was filed by the executors on November 22, 1932. The complaint in this action was served

[fol. 100] November 27, 1936 and the answer containing said set-off and recoupment was served March 11, 1937. Section 310 of the Revenue Act of 1926 provides that no assessment can be made and no proceeding in court to collect without assessment begun after the expiration of three years after the return was filed. The alleged claim for federal estate tax liability against the plaintiff as transferee set forth in the said set-off and recoupment is barred, as to assessment, by Section 316 of the Revenue Act of 1926 which provides that the period of limitation for assessment against a transferee is within one year after the expiration of the period of limitation for assessment against the executor or donor, and is barred, as to collection without assessment, by Sections 310 and 316 taken together which bar proceedings for collection without assessment unless begun within three years of the time the return was filed.

20. If the plan terms of the statute of limitations are to be disregarded on some equitable doctrine to support the set-off and recoupment, the following facts bearing on the equity of the situation should be considered:

21. As appears from the affidavit of James S. Y. Ivins, verified March 15, 1937, hereto annexed, the very question of the liability of the executors for the federal estate tax set forth in the set-off and recoupment was, after filing of copies of the compromise agreement and other documents and the filing of briefs and after conferences with attorneys for the executors, finally decided, on July 24, 1933, by the Commis- [fol. 101] sioner of Internal Revenue in favor of the executors. A copy of the letter of the Acting Deputy Commissioner, dated July 24, 1933, advising that "there is no deficiency in this case" is annexed to the affidavits of George S. Fuller and of James S. Y. Ivins annexed hereto.

22. Paragraph 17 of the agreement of May 1, 1933, amending the compromise agreement and providing for the method of distribution of the estate by the executors, a copy of which is hereto annexed and marked "Exhibit D" provides as follows:

"This agreement having been made upon the understanding that before June 26, 1933 or the date to which said date has been extended the Federal Estate Tax would have been finally determined on the basis of the terms of the will and not of the Compromise Agreement, it is agreed that unless

the Executors shall have received notices before such date that the Commissioner of Internal Revenue has made such a final determination and that no additional assessment is to be made substantially in excess of an additional assessment of approximately $45 already agreed to by the Executors, this agreement shall cease to have any further force or effect except that the time for performance of Article 'Fifteenth' of the Compromise Agreement shall thereupon become extended to August 26, 1933."

The effective date of determination was extended to July 26, 1933. Upon information and belief the Bureau of Internal [fol. 102] Revenue was advised of the urgency of a determination of the federal estate tax because of the above provision. In reliance upon the advice of final determination that there was no deficiency in federal estate tax due from the said estate, the executors carried out the said agreement of May 1, 1933 and distributed the estate in accordance with the will as modified by the compromise agreement, pursuant to the order of the Probate Court.

23. By the Thirteenth Article of the compromise agreement the federal estate tax was deductible in computing the "net residue" and the "net residue" was divided equally between the residuary legatee and the heirs. Thus it was intended that the residuary legatee should bear one-half the federal estate tax. To the best of deponent's knowledge, information and belief there is no agreement on the part of *of* the residuary legatee to reimburse the plaintiff for one half of any additional federal estate tax which plaintiff may be compelled to pay.

24. In any event, the defendant should not be allowed to set off against the plaintiff more than the plaintiff's share of the tax, had it been timely assessed. Under the provisions of the compromise agreement the residuary legatee would have borne one-half of the federal estate tax and the heirs would have borne one-half. The plaintiff received one-tenth of the heirs' share of the estate and plaintiff's share of the federal estate tax, had it been timely assessed, would have been one-twentieth thereof. In the federal estate tax return the units of stock distributed to the heirs [fol. 103] were valued at $250 per unit. At this valuation the additional federal estate tax would have been approximately $53,178.80 and the plaintiff's share would have been

one-twentieth thereof, or approximately $2,658.94. In computing the deficiency in income taxes the Commissioner used a value of $400 per unit. At this valuation the additional federal estate tax would have been approximately $97,845.49. The plaintiff's share would have been one-twentieth thereof, or approximately $4,892.27.

25. Plaintiff and his brother, J. M. Richardson Lyeth, Jr., were the only ones of the heirs of said Mary Beecher Longyear who paid the income tax deficiencies for the year 1933. All the other heirs have filed petitions to the Board of Tax Appeals. The United States cannot assert the set-off or recoupment against these heirs in the proceedings before the Board of Tax Appeals because it is there asserting assessments of additional income taxes which have not been paid. If the set-off in this action is allowed, plaintiff and his brother will be penalized solely because they paid the deficiencies instead of filing petitions to the Board of Tax Appeals.

(Signed) J. M. Richardson Lyeth.

Sworn to before me this 18th day of March, 1937. Christopher J. Heavey, Jr., Notary Public, Kings County, N. Y. Kings Co. Clk's No. 77 Reg's No. 8081. N. Y. Co. Clk's No. 666 Reg's No. 8H896. Nassau County Clerk's No. 8H22. Commission expires March 30, 1938. (L. S.).

[fol. 104] EXHIBIT A TO AFFIDAVIT

ASSIGNMENT AND DECLARATION OF TRUST

I, Mary Beecher Longyear, of Brookline, in the County of Norfolk and Commonwealth of Massachusetts, do hereby transfer, set over, assign and deliver unto The First National Bank of Boston, a corporation duly organized and existing under the laws of the United States of America, having its usual place of business in the City of Boston in the County of Suffolk in said Commonwealth, and to Frederick P. Burrall, of Marquette, in the State of Michigan, the following securities, namely:

$1,000 par value New York Edison Company 6-½% bond due October 1, 1941.
-2,000 par value Fourth Liberty Loan 4-¼% bonds due October 15, 1938.
$1,000 par value United States Steel Corporation 5% bond due April 1, 1963.

all with unmatured coupons attached, being all the property this day delivered by said The First National Bank of Boston and Frederick P. Burrall of said Marquette in compliance with my written request delivered to said The First National Bank of Boston and said Burrall under the provisions of the third paragraph of a certain instrument entitled "Assignment and Declaration of Trust", and dated February 18, 1924, the receipt by me of said property thus delivered being hereby acknowledged.

To have and to hold to said The First National Bank of Boston and to the said Frederick P. Burrall and its and his [fol. 105] successors in trust, upon trust for the following uses and purposes:

To hold, manage, invest, reinvest and dispose of said property and all other property, whether real, personal or mixed, which may be given, conveyed, devised or bequeathed to them in their capacity as trustees hereunder, and all other property of whatsoever kind at any time belonging to the trust as a trust estate, with all the powers except as herein specifically provided of an absolute owner in his own right, with the benefit and subject to the provisions hereinafter following:

(a) Appointment of Trustees, Bonds, etc.

In case either the said The First National Bank of Boston or said Frederick P. Burrall hereinbefore named shall not accept this trust by signing this instrument within thirty days from the date hereof, the vacancy thus created, as also any vacancy hereafter created or occurring by death, resignation, disability or removal, shall be filled by me the said Mary Beecher Longyear during my life by an appropriate instrument in writing, the original or a copy of such instrument to be delivered by me to the remaining or surviving trustee, and after my passing on such vacancy shall be filled in like manner by vote of a majority of the trustees for the

time being of the estate of John M. Longyear, and in the event that such vacancy is not so filled within thirty days after it occurs, then it shall be filled in like manner by a vote of a majority of the trustees of the Longyear Foundation hereinafter more fully described. In case of any such vacancy, including any vacancy caused by the failure of said [fol. 106] The First National Bank of Boston or said Frederick P. Burrall to accept the trust by signing this deed within thirty days from the date hereof, and until such vacancy shall be filled as above provided, the other trustee hereinbefore named or the surviving or continuing trustee as the case may be shall have all the right, title, interest and powers conferred by this instrument upon said The First National Bank of Boston and Frederick P. Burrall and their successors in trust.

No trustee shall be obliged to give bond unless required to do so by a court of competent jurisdiction, and if so required no sureties need be furnished unless so ordered by such court.

(b) Sales, Investments, etc.

The trustees shall have full power to sell, convey, lease, partition, exchange, release or otherwise dispose of any property at any time belonging to the trust at public or private sale for such consideration and upon such terms as to restrictions, conditions, credit, and otherwise as they shall deem expedient; they shall have full power to invest the proceeds of any such sale or other disposition in such real or personal property as at the time they may deem to be safe and proper trust investments.

(c) Decision of Questions as Between Capital and Income

The trustees shall have full power to decide whether special or extraordinary dividends paid in stock, scrip, money or however otherwise declared shall be treated as [fol. 107] capital or income or shall be divided between capital and income, and if so, in what proportions; whether all the income of wasting investments or of securities bought at a premium shall be treated as income or as capital, or shall be divided between income and capital, and if so, in what proportions, and to decide any and all other questions between capital and income; also to set aside out of income annually and from time to time such amounts as they may deem to be necessary to provide for the depreciation of any

buildings or other physical property belonging to the trust, in addition to the sums, if any, expended for operation, maintenance and repairs. They shall also have the power if they see fit to charge all expenditures, including taxes incurred in connection with vacant land or unproductive property, to capital.

(d) Liability of Trustees and Purchasers

The trustees are hereby authorized to hold for as long as they may in their uncontrolled discretion see fit any mining securities or other hazardous or wasting property or unimproved or unproductive lands, wherever situated, which may come to them either by this deed or by future transfers, devise or bequest from me, although the same may be investments which it would not be legally proper for trustees to make or hold in the absence of these powers.

No trustee shall be liable by reason of any act or default of a co-trustee or employee or agent, or for any accident, mischance, or error of judgment, or for anything except his [fol. 108] own wilful act or default. Any sums that may be recovered against the trustees or any of them, either as such or individually, for or on account of any injury or damage to person or estate sustained by any person through the negligence incompetency, dishonesty, or fault of any agent or employee of the trustees, or due to any accident, mischance or error of judgment on the part of the trustees, shall be paid from the trust property and the trustees shall be exonerated and held harmless therefrom.

No purchaser, lender, or other person paying money or delivering property to the trustees shall be under any obligation to see to the proper application thereof, but the receipt of the trustees shall be conclusive.

(e) Compensation of Trustees

Each trustee shall receive a reasonable compensation for his services. The amount thereof in any year shall be apportioned between capital and income in such manner as the trustees at the close of the year shall determine.

(f) Books and Accounts

The trustees shall keep proper books showing all their receipts, expenditures and doings in the management of the

trust, which books shall at all reasonable times be open to inspection by me and after my death by said trustees of the Longyear Foundation and/or by my daughters Abby B. Roberts and Helen Longyear Paul.

Full and accurate accounts of the receipts, expenditures, and doings of the trustees in the management of the trust [fol. 109] shall be made at the end of each calendar year, or as soon thereafter as is practicable, and copies thereof shall be sent to me and after my death to said trustees of the Longyear Foundation.

(g) Powers of Alteration

At any time and from time to time during my life this deed and any of the provisions thereof may be altered, cancelled, revoked or amended by an instrument in writing signed and sealed by myself and delivered during my life to the then trustees of the trust hereby created.

(h) Distribution of Net Income of the Trust

Unless and until the trust is revoked and terminated by me as hereinbefore provided, and unless and until I by request in writing signed by me and delivered to the trustees hereunder during my life shall order and direct some other disposition of the whole or any part of the net income of said trust (and I hereby expressly reserve the right so to do), the net income of the trust shall be paid, except as hereinafter provided, in equal quarterly payments or oftener if convenient to the trustees under a certain declaration of trust a copy whereof is hereto annexed and marked Exhibit "A" entitled "Assignment and Declaration of Trust, Longyear Foundation", and of even date with this instrument, or to the person holding the office of Treasurer of said trustees of the Longyear Foundation, to be by the trustees of said [fol. 110] Longyear Foundation administered and applied on the terms and for the purposes in said last mentioned declaration of trust contained. Upon being requested so to do in writing by a majority of the persons who at the time of making such request are trustees of said Longyear Foundation, the trustees hereunder shall add the whole or any part of the income of the trust fund to the principal thereof. The payment by the trustees hereunder of the income of said trust fund to the person who shall at the time of such pay-

ment hold the said office of treasurer of said trustees of said Longyear Foundation shall constitute a full compliance by the trustees hereunder with the provisions touching the payment and distribution of the income of the said trust fund to said last mentioned trustees.

In the event that said trustees of said Longyear Foundation incorporate themselves or procure from the Legislature of Massachusetts a special charter in accordance with Paragraph 10 of said declaration of trust hereto annexed and marked Exhibit "A", all payments which under the terms of this instrument are to be made to the treasurer of said trustees are to be made to the treasurer of such corporation or other officer thereof duly authorized to receive the same.

Acceptance by the Trustees

We, the said The First National Bank of Boston and Frederick P. Burrall hereby severally join in this instrument in token of our acceptance of the same and of the trust thereby created.

[fol. 111] In witness whereof we the said Mary Beecher Longyear and Frederick P. Burrall hereunto set our hands and seals, and said The First National Bank of Boston has caused these presents to be executed and its corporate seal to be hereunto affixed by Olaf Olsen its Vice-President thereunto duly authorized all on this fifth day of April in the year of our Lord one thousand nine hundred twenty-six.

Mary B. Longyear (Seal), Frederick P. Burrall (Seal), The First National Bank of Boston (Seal), by Olaf Olsen, Vice Pt.

Commonwealth of Massachusetts,
Suffolk, ss:

Boston, April 5, 1926.

Then personally appeared the above named Mary Beecher Longyear and acknowledged the foregoing instrument to be her free act and deed. Before me,

Romney Spring, Justice of the Peace. My commission expires Nov. 27, 1932.

[fol. 112] EXHIBIT B TO AFFIDAVIT

Extract from "Assignment and Declaration of Trust, Longyear Foundation", dated April 5, 1926, executed by Mary B. Longyear.

2. Purposes of the Trust

The general purposes of the trust shall be the preservation by a society composed of Christian Science women of the records of the earthly life of Mary Baker Eddy and the establishment of her doctrines unchanged so that she may not be relegated to a realm of mysticism where she might be worshipped and designated as a saint, and to material and scholastic education in accordance with the following paragraph contained in a letter written by said Mary Baker Eddy to said Mary Beecher Longyear and dated January 11, 1906.

"You as an eminent Christian Scientist can do much in educating others materially or scholastically."

The trustees from time to time hereunder are authorized to adopt such means and take such action to effect this purpose as may seem to them expedient, except as herein expressly otherwise provided, and without limiting this general power are expressly authorized to administer the trust and expend the trust funds as follows:

(a) For the maintenance and upkeep including the payment of taxes and the making of repairs on the houses now owned by said Mary Beecher Longyear in which Mrs. Mary Baker Eddy visited or lived and to the purchase, maintenance and upkeep of other sites or houses having historical value in connection with the origin or development [fol. 113] of the religion of Christian Science and to the furnishing of all the above mentioned houses, and in general to the acquisition and preservation of everything pertaining to Mary Baker Eddy's earthly life, Provided that nothing herein contained shall be construed to affect the legal title of Mrs. Mary Beecher Longyear to any real estate now owned by her, and that unless and until she shall convey to the Trustees hereunder, or to The First National Bank of Boston and said Burrall as Trustees of the trust hereinbefore referred to, the legal title to the real estate hereinabove in this section referred to as belonging to her, the carrying out of

the provisions herein contained for the maintenance and upkeep of the same shall be subject to the approval of said Mary Beecher Longyear. In connection with the maintenance and upkeep of said houses and sites the Trustees may facilitate and promote a voluntary organization which may bear such name or designation as the Trustees hereunder may determine, and may be organized and administered in general conformity with the plan of organization and administration of the "Mount Vernon Ladies Association of the Union", a charitable corporation organized and existing under the laws of the Commonwealth of Virginia, or in such other manner as the Trustees may determine. The Trustees hereunder may make such regulations touching admission fees and dues for said voluntary association and such other rules and regulations for its government and for the application and expenditure of any income it may re-
[fol. 114] ceive from dues or otherwise as they may from time to time determine. Said houses and sites shall be open to the members of said voluntary association and to the public at such reasonable times and on such reasonable terms as the Trustees may from time to time determine.

(b) Subject to the same approval of said Mary Beecher Longyear during her life, the Trustees shall devote whatever part of said income may, in their judgment, be necessary and advisable to the housing, care and exhibition of a large collection of books, pictures, letters, manuscripts, historical data and the like relating to said Mary Baker Eddy and now in the possession of said Mary Beecher Longyear or such part thereof as may at any time come into their possession or control. The Trustees hereunder may erect and maintain a building or buildings adapted for the following purposes, namely, for the preservation, care and exhibition of said collection and for the purpose of furnishing suitable quarters for said voluntary association, and for the trustees under a certain declaration of trust entitled "Assignment and Declaration of Trust, Zion Research Foundation", dated March 19, 1920, unless such building or buildings have been erected by said Mary Beecher Longyear during her life, or may complete the construction of such building or buildings should any situation arise making such action appropriate in the opinion of the said trustees hereunder. Such building or buildings shall be erected on that portion of the real estate now owned by said Mary

Beecher Longyear situated on Fisher Hill in said Brookline, [fol. 115] and bounded by Seaver Street, Buckminster Road, and Holland Road if practicable and in the opinion of the trustees hereunder desirable, but may be erected on such location as the trustees hereunder may determine. In the event of the erection of such building or buildings, one of them or a suitable portion of one of them shall be known as the Longyear Gallery, and the trustees hereunder shall keep in said gallery the pictures of said Mary Baker Eddy and other persons connected with the teaching of the doctrines of Christian Science and pictures of places connected with such teaching which form part of said collection properly hung and displayed, and such pictures shall never be sold, but shall be kept on exhibition to the public at least three days a week or oftener on such terms as the trustees hereunder may, from time to time deem reasonable, and no other pictures shall be added to that collection except pictures of Mary Baker Eddy, her family and of places connected with her earthly life, and such building and the lot of land upon which it stands shall never be sold. Suitable quarters in said building may be furnished to the trustees of said Zion Research Foundation for their use and for the maintenance of a library in accordance with the provisions of said trust deed entitled "Assignment and Declaration of Trust, Zion Research Foundation", and the trustees of said Zion Research Foundation shall pay reasonable rent for such quarters. Said building or buildings shall at all times be maintained in suitable and proper repair by the trustees hereunder. Such suitable provision shall be made [fol. 116] for the care and exhibition of said books, letters, manuscripts and the like as the Trustees hereunder may determine.

(c) The Trustees hereunder may pay and dispose of the income of the trust and take such other action as may be necessary or convenient to carry out and effect the provisions of the last will and testament of said Mary Beecher Longyear.

(d) The Trustees hereunder may also expend such portion of said income as they may deem to be reasonable and proper and not inconsistent with the purposes hereinbefore expressed or such as may be hereafter designated by said Mary Beecher Longyear to further the cause of Christian

Science as taught by Mary Baker Eddy by the distribution of copies of Science and Health with Key to the Scriptures and other writings of Mary Baker Eddy according to the last editions thereof published not later than 1910 and/or to the promotion of the cause of Christian Science by gifts or otherwise in such manner as may seem to them appropriate and not inconsistent with the preceding provisions of this instrument.

[fol. 117] EXHIBIT C TO AFFIDAVIT

Extract from "Assignment and declaration of Trust, Longyear Foundation," dated April 5, 1926, executed by Mary B. Longyear.

33. Alteration. Revocation.

At any time and from time to time during the life of said Mary Beecher Longyear this declaration of trust and any of the provisions thereof may be altered, cancelled or amended by an instrument in writing signed and sealed by her and delivered to the trustees hereunder or to their duly appointed secretary, and in the event that said trust a copy of which is hereto annexed and marked Exhibit "A" is revoked or terminated as therein provided, then the trust created by this instrument and the duties and liabilities of the trustees hereunder shall cease and determine, and all property held by the trustees hereunder at the date of such termination shall be by them conveyed, assigned and transferred to said Mary Beecher Longyear free from any trust.

EXHIBIT D TO AFFIDAVIT

Estate of MARY BEECHER LONGYEAR

Agreements Concerning Pecuniary Legacies and Distribution of Estate

May, 1933.

This Agreement made and entered into as of the first day of May, 1933, between Abby Beecher Roberts, Helen Long-
[fol. 118] year Paul, John M. Longyear, Robert D. Longyear, J. M. Richardson Lyeth, Jr. and Munro Longyear

Lyeth, heirs of Mary Beecher Longyear, deceased, (hereinafter called the Heirs);

Carroll Paul of Marquette, Michigan, and such pecuniary legatees under Paragraphs 17, 18, 20, 21, 23, 28 or 30 of the will of Mary Beecher Longyear as shall become parties to this Agreement (who with their heirs, executors, administrators, successors and assigns shall be hereinafter called the Depositors),

Witnesseth, That

It is agreed by and between the parties hereto, the Depositors severally agreeing with each other and with the other parties hereto, and each party agreeing for itself or himself or its or his heirs, executors, administrators, successors and assigns, as the case may be, as follows:

Article I

Manner of Becoming a Depositor

Section 1. Any of the pecuniary legatees named in Paragraphs 17, 18, 20, 21, 23, 28 or 30 of said will of Mary Beecher Longyear may become a party to this Agreement by executing and delivering to Carroll Paul on or before June 1, 1933 (or within such further time as the said Paul may from time to time, either before or after that date, permit generally or in special instances), the offer to the new Corporation (which is the corporation referred to in [fol. 119] the agreement hereto annexed marked "A"), the release to the Executors and the assignment to said new Corporation in the forms annexed at the end of this Agreement and marked respectively "D," "E" and "F." But in no event shall said new Corporation issue preferred stock to said pecuniary legatees so becoming parties to a total aggregate par value exceeding $165,000.

Section 2. The said Paul shall act as Depositary for said offers, releases and assignments of said Depositors; and the said Paul as such Depositary shall hold all such offers, releases and assignments delivered to him by the Depositors until this Agreement has been declared operative in the manner hereinafter provided and shall thereafter in his sole discretion deliver such offers, releases and assignments to said new Corporation.

Article II

Declaration That This Agreement Has Become Operative

Section 1. Carroll Paul in his sole discretion may declare this Agreement operative, and the same shall be deemed to have become operative, upon the mailing of written notice to that effect addressed to each of the parties to this Agreement and to each then Depositor on or before June 26, 1933, unless the time for performance of the Agreement hereto annexed marked "A" (hereinafter called the Basic Agreement) is extended beyond such date, and in such event the time for such declaration shall be similarly extended.

[fol. 120] Section 2. As soon as possible after the declaration by the said Paul that this Agreement has become operative, he shall take such steps and do such acts and execute such documents, file such petitions in Court and do such other things as in his uncontrolled discretion he may deem advisable or necessary to carry into effect all of the provisions hereof and of the Basic Agreement, including forming the Corporation referred to in the Basic Agreement and causing said Corporation to do such things as may be necessary to (a) accept the offers and assignments from the Heirs contemplated by the Basic Agreement in return for the issue to the Heirs hereinafter named of the entire authorized common stock of said Corporation in the following proportions: two shares each to Abby Beecher Roberts, Helen Longyear Paul, John M. Longyear, Robert D. Longyear, and one share each to J. M. Richardson Lyeth, Jr. and Munro Longyear Lyeth, minors, or to their duly appointed guardian, (b) accept the said offers, releases and assignments from the Depositors in return for the issue to each such Depositor of preferred shares on the basis of one preferred share for each $100 face value of the pecuniary legacy of each Depositor so offered, released and assigned, (c) surrender to the Executors referred to in the Basic Agreement the rights and releases acquired from said Heirs and from said Depositors in return for a proper transfer of ownership to said Corporation of the property to be transferred to it under the terms of the Basic Agreement.

[fol. 121]

Article III

Abandonment of This Agreement

Section 1. Carroll Paul in his sole discretion at any time before or after this Agreement is declared operative may abandon the same; and the same shall be deemed to have been abandoned upon the mailing of notice of such abandonment addressed to each of the parties to this Agreement and to each Depositor.

Section 2. Unless the said Paul has declared this Agreement operative within the period in which he may do so in the manner hereinbefore provided, it shall be deemed to be abandoned at the expiration of such period.

Section 3. In case this Agreement is abandoned either by declaration of the said Paul or by the expiration of said period thereupon this Agreement shall have no further force or effect, and said Paul shall thereupon take such steps as may be necessary to cause the return to the respective Depositors and to the Heirs of their respective offers, releases and assignments.

Article IV

Particular Covenants of the Depositors

Section 1. Each Depositor hereunder by becoming a Depositor in the manner herein provided, covenants with every other Depositor hereunder and with each of the other parties hereto:

[fol. 122] (a) That until August 26, 1933 each Depositor will take no steps of any nature seeking to enforce payment of the pecuniary legacy of such Depositor.

(b) That upon this Agreement being declared operative in the manner hereiff provided, and upon the formation of said Corporation, such Depositor will take in return for the assignment of his right to his pecuniary legacy, preferred stock of said Corporation at $100 a share for each $100 face amount of such pecuniary legacy so offered, released and assigned, and will thereafter make no further claim for payment thereof.

Article V

Covenants of the Heirs

The Heirs will take steps forthwith to cause guardians of the minor grandchildren of Mary Beecher Longyear to be appointed by the Probate Court for the County of Norfolk, Massachusetts, and, if necessary, to seek Court approval of such grandchildren, through such guardians, becoming parties to this Agreement. The said Heirs and the guardians of minor Heirs when appointed shall also promptly take steps to execute offers and assignments in the forms hereto annexed marked respectively "B" and "C" and shall upon said execution deliver such offers and assignments forthwith to Carroll Paul, Longyear Building, Marquette, Michigan.

[fol. 123]

Article VI

Miscellaneous Provisions

Section 1. Carroll Paul may decline to receive any offer, release and/or assignment from any person who intends to become a Depositor or may return to such person any such offer, release and/or assignment in case in his sole discretion he has reason to believe that said offer, release and/or assignment is invalid or ineffectual for the purpose of this Agreement, or in case the acceptance from such person of such offer, release and/or assignment would make the total of such offers, releases and assignments, if all were accepted, exceed $165,000.

Section 2. No pecuniary legatee who fails to become a Depositor hereunder in the manner herein provided, shall have any rights or claims whatsoever under or by virtue of this Agreement nor shall this Agreement be construed as creating any trust, duty or obligation whatsoever for or to any person, firm, association or corporation not a party hereto.

Section 3. This Agreement is made and entered into under the laws of the Commonwealth of Massachusetts and each and every provision herein shall be construed under, by and in accordance with the laws and decisions of said Commonwealth.

Section 4. This Agreement shall bind and enure to the benefit of the Depositors, their heirs, executors, admin-
[fol. 124] istrators, successors and assigns, and the Heirs, their heirs, executors, administrators, successors and assigns.

Section 5. Carroll Paul may carry out any of the terms of this Agreement by him to be performed through his attorneys, agents or employees, and shall be answerable only for his own acts, receipts, neglects and defaults and not for those of any person employed by him and selected with reasonable care, nor for loss unless the same shall happen through his own wilful default. He shall not be bound to ascertain or inquire as to the performance or observance of any of the agreements of any other party to this instrument, and shall be protected in any action taken or suffered by him in good faith. In case for any reason Carroll Paul shall cease to act as Depositary hereunder, then Robert R. Duncan of Cambridge, Massachusetts, or in case of his disability, Samuel Hoar of Concord, Massachusetts, shall thereupon become the Depositary hereunder and shall thereupon succeed to all the powers, obligations and immunities of the said Carroll Paul as Depositary.

Section 6. This Agreement may be executed in any number of counterparts, the several parties may execute separate counterparts with the same effect as if all the parties executing the same had executed but one instrument, each counterpart shall be deemed an original and all such counterparts taken together shall constitute but one agreement. One original counterpart shall be lodged with Longyear Estate, Inc., at its office at Marquette, Michigan. This [fol. 125] Agreement shall become irrevocably binding upon each Heir as soon as executed by him or his guardian, and upon each Depositor as soon as he or his guardian executes and delivers to the Depositary the papers provided for in Article I. The papers delivered to the Depositary under Articles I and V are to be deemed to have been irrevocably deposited in escrow with the Depositary for the purposes and upon the conditions stated in this Agreement. In this Agreement reference to declaring this Agreement operative shall be deemed to mean declaring operative the plan contemplated to be carried out pursuant to this Agreement.

In witness whereof the parties have hereunto set their hands and seals as of the day and year first above written.

. . . . . .

. . . . . .

Robert D. Longyear, by Mayo Shattuck, Attorney;
——— ———, Guardian of J. M. Richardson Lyeth, Jr. and Munro Longyear Lyeth, minor sons of the late Judith Longyear Lyeth.

[fol. 126] "A"

Agreement made this first day of May, 1933 by and between Abby Beecher Roberts, Helen Longyear Paul, John M. Longyear, Robert D. Longyear, and J. M. Richardson Lyeth, Jr. and Munro Longyear Lyeth, minors, by their Guardian duly appointed by the Probate Court for the County of Norfolk, Massachusetts, (hereinafter collectively called the "Heirs"), of the first part, The First National Bank of Boston and Frederick P. Burrall, (hereinafter called the "Endowment Trustees"), as they are Trustees under a certain instrument entitled "Assignment and Declaration of Trust" dated April 5, 1926 executed between said Trustees and Mary B. Longyear (hereinafter called the "Decedent"), as heretofore amended, of the second part, and The First National Bank of Boston, Smith Johnson and Howard N. Pease, as they are Executors of the will of the Decedent (hereinafter called the "Executors"), of the third part,

Whereas by the Compromise Agreement dated April 26, 1932, pursuant to which said will of the Decedent was allowed as modified by said Agreement, it is provided that the "net residue" (as herein defined) is to be delivered by the Executors to the Endowment Trustees and the Heirs at the expiration of thirteen months from the date of giving bond by the Executors, which expiration date will be May 26, 1933; and

Whereas it appears evident that there will not be cash or assets readily convertible into cash sufficient to enable [fol. 127] the Executors to pay the pecuniary legacies (amounting to $330,100) after satisfying all debts, expenses of administration, taxes and other charges against the

estate, by said expiration date or within any short time thereafter without selling "units" (as defined in said Compromise Agreement); and

Whereas the parties hereto believe it to be for their best interest that none of such units be sold; and

Whereas the Endowment Trustees and the Heirs have requested that no units be sold and desire to have the "net residue" delivered to them as provided in said Compromise Agreement, except as hereinafter otherwise provided, and to that end have agreed upon the plan hereinafter set forth and have requested the Executors to join in this agreement for the purpose of providing a method for the payment of said legacies and for the protection of the Executors in delivering said "net residue" to the Heirs and the Endowment Trustees at the present time;

Now, therefore, in consideration of the several covenants hereinafter set forth, it is mutually agreed by the respective parties hereto, as follows:

1. The Heirs agree that they will cause a corporation to be formed (hereinafter called the "Heirs' Corporation"), and that they will assign to such Corporation their rights to receive their share of the "net residue" under said Compromise Agreement and that they will cause said Corpora- [fol. 128] tion to surrender to the Executors said right of the Heirs to receive such share of the "net residue" under said Compromise Agreement. The Heirs also agree that they will cause legatees to assign to the Heirs' Corporation their rights to receive legacies aggregating $165,050 and interest thereon and that they will cause releases under seal to be delivered to said Corporation, these releases to be substantially in the form hereto annexed duly executed by said legatees or their guardians or legal representatives appointed in this Commonwealth. The Heirs agree that said Corporation will deliver to the Executors not later than June 26th, 1933 said releases of legatees. The Heirs may cause said Corporation to pay to the Executors any part of said amount, instead of furnishing releases of legatees therefor, provided the aggregate of the cash and the releases is not less than $165,050 in principal amount of legacies and all interest thereon. All releases executed by guardians or other legal representatives appointed by said Probate Court shall be accompanied by a certified copy of the decree of such Court in substance approving the execu-

tion and delivery of such release or releases pursuant to the terms of this agreement.

2. The Endowment Trustees agree to deliver to the Executors not later than June 26th, 1933 releases under seal, similarly executed and approved as in the case of the releases to be furnished by the Heirs as provided in the preceding paragraph, to the amount of the remaining $165,050 of pecuniary legacies with all interest thereon. The Endowment Trustees may pay to the Executors any part of [fol. 129] said $165,050, instead of furnishing releases of legatees therefor, provided the aggregate of the cash and the releases is equal to $165,050 in principal amount of legacies and all interest thereon.

3. Upon delivery to them by the Heirs' Corporation and the Endowment Trustees of releases or of cash to a total amount of $330,100 of pecuniary legacies and the interest thereon, the Executors agree that they will deliver to the Heirs or their assignee and the Endowment Trustees the "net residue" of the estate of the Decedent in accordance with Paragraph Fifteenth of said Compromise Agreement, except as herein provided, and that they will pay as soon as possible thereafter the legacies and interest for which they receive cash instead of releases. In determining the amount of the "net residue" to be delivered to the Heirs or their assignee and the Endowment Trustees, no part of the cash so received instead of releases shall be included as a part of the gross estate, and there shall be no deductions from the gross estate on account of any of said pecuniary legacies or of the interest due thereon, except the interest due for one year, beginning with the death of the Decedent, on the legacies under Items 19 and 22 of said will.

4. It is mutually agreed that all the legacies under Items 21, 22 and 23 of said will shall be paid or discharged in the manner herein set forth.

5. Coincidentally with the delivery as provided in Paragraphs 1 and 2 hereof of the releases or cash referred to [fol. 130] therein, the Executors shall deliver to Carroll Paul, representing the Heirs, the original agreement, a copy of which is annexed to the Compromise Agreement and marked "B" and shall deliver to the Trustees of the En-

dowment Trust the original agreement, a copy of which is annexed to the Compromise Agreement and marked "A", all as referred to in Paragraph Twelfth of said Compromise Agreement, and thereafter all obligation of the Heirs and the Endowment Trustees referred to in their said respective agreements shall be of no further force or effect.

6. The parties hereto agree that they will extend or cause to be extended the time for paym-nt of all the notes of Longyear Estate, Inc. and of Longyear Realty Corporation due March 1, 1933, of a total amount of approximately $300,000 now held by any of them and by the Trustees of the Estate of John M. Longyear until March 1, 1938, and that such extension shall be stamped or endorsed upon said notes, or that new notes of like tenor maturing on March 1, 1938 may be substituted for the notes above referred to.

7. The Heirs agree and hereby direct that the Executors deliver the one-half of the "net residue" to which the Heirs are entitled under Paragraph Fifteenth of the Compromise Agreement as herein modified by causing the transfer of the ownership of such half of the "net residue" to the Heirs' Corporation, as assignee of the Heirs' rights to such delivery; that the first dividend for apportionment, as provided in said Paragraph Fifteenth, shall be deemed to be the [fol. 131] first distribution upon the units referred to in said Paragraph paid after May 26th, 1933, and the Executors or the Heirs' Corporation, whichever may receive such first distribution, shall assume the obligation as to such apportionment; and that such transfer of ownership of such half of the "net residue" to the Heirs' Corporation shall comprise full payment, satisfaction and discharge of the obligation of the Executors to the Heirs under said Paragraph Fifteenth. The Heirs also agree and direct that all cash or property to which they may be or become entitled from the estate of the Decedent shall similarly be paid and delivered to the Heirs' Corporation.

8. The Heirs agree that, coincidentally with the delivery to Carroll Paul of the agreement referred to in Paragraph 5 hereof, they will cause the Heirs' Corporation to execute and deliver to the Executors a written agreement to save harmless and to reimburse the said Executors from or for one-half of all the then existing liabilities of said Executors, which are then contingent, undetermined or unknown,

whether or not any funds for the payment of such liabilities are retained by said Executors, but only to the extent that said Executors lack assets of the estate for the payment of such liabilities. The Endowment Trustees agree that in their capacities as such Trustees, but not individually, they will enter into a written agreement of like tenor with the Executors.

9. This agreement shall become binding upon each party hereto as soon as executed, provided, however, that if all [fol. 132] of the parties have not executed it by May 26th, 1933 it shall cease to be binding. If the execution of this agreement by the Executors and the guardians of the minor Heirs shall not have been approved by the Probate Court of their appointment by June 26th, 1933 or if the Endowment Trustees or the Heirs' Corporation are unable to make delivery of releases or payments of cash sufficient to cover their respective obligations under Paragraphs 1 and 2 hereof by June 26th, 1933, and the time for such approval, delivery or payment has not been extended by virtue of any provisions of this agreement or otherwise, this agreement shall cease to have any further force or effect except that it is hereby agreed by the Heirs and Endowment Trustees that in such case the time for performance of said Article Fifteenth shall thereupon become extended to August 26th, 1933. Any of the dates specified in this agreement, except the new date for maturity of the notes hereinabove stated in Paragraph 6, may be changed by agreement of the Executors, the Endowment Trustees and a majority in interest of the Heirs, before or after execution of the agreement.

10. The Executors agree that within one week after the delivery of the "net residue" to the Heirs' Corporation and the Endowment Trustees as provided in Paragraph 3 above, they will file their Executors' account showing the distribution of the entire estate, except such part thereof as they may retain for the payment of contingent tax liabilities and will proceed as speedily as possible to have said account [fol. 133] finally determined and adjudicated by said Probate Court; and it is agreed by the parties hereto that for the purposes of Paragraph Eighteenth of said Compromise Agreement the date of the allowance of the final account of the Executors shall be deemed to be six months

from the date of the allowance of the account above referred to.

11. The Executors and the Endowment Trustees agree that the Heirs shall have the exclusive right to approach the legatees named in Items 17, 18, 20, 21, 23, 28 and 30 of said will for the purpose of including them among the legatees whose legacy releases the Heirs' Corporation may deliver as provided in Paragraph 1 of this agreement.

12. It is understood that all stamp taxes on the transfer of securities by the Executors are to be paid out of the funds of the estate and charged as an expense of administration, and the Heirs agree to pay or cause to be paid all stamp taxes, if any, payable with respect to the transfer or assignment by them to the Heirs' Corporation of their right to receive units or other property which would otherwise have been deliverable by the Executors to the Heirs.

13. In the event that at the time for performance of the agreements set forth in Paragraphs 1, 2 and 3 above there shall be in force any legislation, proclamation or order of the government of any state or of the United States or any banking restrictions on withdrawals, which would prevent the Executors from then paying all liabilities of the estate or of the Executors which were then known and finally de- [fol. 134] termined, and making the distribution as provided in Paragraph 3 above, or which would prevent any party or parties hereunder from making any payment, or fulfilling any obligation hereunder, then the time for performance of the agreements set forth in Paragraphs 1, 2 and 3 shall be extended until all such payments may be made.

14. This agreement is made and entered into under the laws of the Commonwealth of Massachusetts and each and every provision hereof shall be construed under, by and in accordance with the laws and decisions of said Commonwealth.

15. This agreement shall bind and enure to the benefit of the heirs, executors, administrators, successors and assigns of the respective parties hereto.

16. This agreement may be executed in any number of counterparts with the same effect as if all the parties executing the same had executed but one instrument, each counterpart to be deemed an original.

17. This agreement having been made upon the understanding that before June 26, 1933 or the date to which said date has been extended the Federal Estate Tax would have been finally determined on the basis of the terms of the will and not of the Compromise Agreement, it is agreed that unless the Executors shall have received notice before such date that the Commissioner of Internal Revenue has made such a final determination and that no additional assessment is to be made substantially in excess of an additional assessment of approximately $45 already agreed to [fol. 135] by the Executors, this agreement shall cease to have any further force or effect except that the time for performance of Article Fifteenth of the Compromise Agreement shall thereupon become extended to August 26, 1933.

In witness whereof, the several parties have hereunto set their hands and seals as of the day and year first above written.

Abby Beecher Roberts (Seal), Helen L. Paul (Seal), John M. Longyear (Seal), Robert D. Longyear, by Mayo A. Shattuck, Attorney. (Seal.) J. M. Richardson Lyeth, Guardian of J. M. Richardson Lyeth, Jr. (Seal.) J. M. Richardson Lyeth, Guardian of Munro Longyear Lyeth. (Seal.) The First National Bank of Boston, by Olaf Olsen, Vice President. (Corporate Seal.) Frederick P. Burrall, Trustees of the Endowment Trust. (Seal.) The First National Bank of Boston, by Olaf Olsen, Vice President. (Corporate Seal.) Smith Johnson (Seal), Howard N. Pease (Seal), Executors.

[fol. 136] The foregoing agreement is hereby approved and the execution thereof by the Endowment Trustees is hereby authorized and assented to.

R. Howard Cooley (Seal), A. Marguerite Smith (Seal), Madie R. Knox (Seal), Trustees of the Longyear Foundation.

——, 1933.

For value received, the undersigned, being entitled to a pecuniary legacy under Paragraph 17, 18, 20, 21, 23, 28 or 30 of the will of Mary Beecher Longyear as modified by a certain Compromise Agreement dated April 26, 1932 and allowed as so modified by the Probate Court for Norfolk

County, Massachusetts, hereby irrevocably releases and forever discharges The First National Bank of Boston, Smith Johnson and Howard N. Peabe, as they are Executors under the said will of the said Mary Beecher Longyear, and the Estate of Mary Beecher Longyear, of and from all claims for the payment of the said pecuniary legacy of the undersigned and accumulated interest, if any, thereon.

Witness my hand and seal.

Witness:

.....

By .....

.....

Address

St. and No. .....

City or Town .....

State .....

[fol. 137] "B"

Longyear Heirs, Inc., Longyear Building, Marquette, Michigan.

GENTLEMEN:

We, the undersigned, being all of the heirs of Mary Beecher Longyear, late of Brookline, Massachusetts, deceased, and being entitled to property, now held by the executors of the will of said Mary Beecher Longyear, in accordance with the compromise agreement dated April 26th, 1932, in the proportions set after our respective names,

Abby Beecher Roberts	2/10
Helen Longyear Paul	2/10
John M. Longyear	2/10
Robert D. Longyear	2/10
J. M. Richardson Lyeth, Jr.	1/10
Munro Longyear Lyeth	1/10

do hereby severally offer to transfer to your corporation all of our respective right, title and interest in and to said property in consideration of the issue to us of an aggregate of ten (10) shares of the common stock of your corporation of the par value of One Hundred Dollars ($100) each, being all of the authorized common stock of your corporation. Said shares shall be issued to us severally in the same pro-

portion as our respective interests in the rights and property to be transferred and therefore shall be issued as follows:—

Abby Beecher Roberts	2 shares
Helen Longyear Paul	2 "
John M. Longyear	2 "
Robert D. Longyear	2 "
[fol. 138] J. M. Richardson Lyeth, Jr.	1* "
Munro Longyear Lyeth	1* "

*Said shares to be issued to J. M. Richardson Lyeth, Guardian.

Upon the acceptance of this offer we hereby severally agree to transfer and assign to your corporation our said right, title and interest in and to said property, and to give to the corporation any agreements or other instruments which may be necessary or proper to fully vest in the corporation all of said rights.

If this offer is acceptable to you, will you kindly endorse upon a duplicate original hereof the acceptance of the corporation signed by a duly authorized officer and return it to Carroll Paul, representing the undersigned.

Robert D. Longyear, by —— ——, Attorney. J. M. Richardson Lyeth, Jr., By —— ——, Guardian.
[fol. 139] Munro Longyear Lyeth, By —— ——, Guardian.

Accepted: Longyear Heirs, Inc., by —— ——, Treasurer.

"C"

For value received, we, the undersigned, Abby Beecher Roberts, Helen Longyear Paul, John M. Longyear, Robert D. Longyear by his attorney, Mayo A. Shattuck, hereunto duly authorized, and J. M. Richardson Lyeth, Jr. and Munro Longyear Lyeth, minors, by J. M. Richardson Lyeth, their guardian duly appointed by the Probate Court for Norfolk County, Massachusetts, being the heirs-at-law of Mary Beecher Longyear, deceased, hereby irrevocably assign, set over and transfer, and give, grant, bargain, sell and convey unto Longyear Heirs, Inc., a corporation duly organized under the laws of the State of Delaware, all of our respective rights under the Compromise Agreement dated April 26, 1932 pursuant to which the will of said Mary Beecher Longyear was allowed, as modified by said agree-

ment, by the Probate Court for the County of Norfolk, Massachusetts, together with the right to enforce such rights in our respective names or in the names of said corporation and to surrender to the Executors under said will all of our rights to receive any share of the "net residue" under said Compromise Agreement.

[fol. 140] In witness whereof, we have hereunto set our hands and seals as of the day of , 1933.

Robert D. Longyear, by —— ——, Attorney. J. M. Richardson Lyeth, Jr., by —— ——, Guardian. Munro Longyear Lyeth, by —— ——, Guardian.

"D"

Longyear Heirs, Inc., Longyear Building, Marquette, Michigan.

GENTLEMEN:

The undersigned, being entitled to a pecuniary legacy under paragraph 17, 18, 20, 21, 23, 28 or 30 of the will of [fol. 141] Mary Beecher Longyear, late of Brookline, Massachusetts, in the amount of $, hereby offers to deliver to your Corporation an irrevocable assignment of all of the right, title and interest of the undersigned to said pecuniary legacy together with all interest due thereon in return for the issue by your Corporation to the undersigned of one share of its preferred stock of the par value of $100 for each $100 face value of the amount of said legacy, or a total of shares of said preferred stock.

The undersigned understands in making this offer that the total amount of preferred stock to be issued to pecuniary legatees shall not exceed a total par value of $165,000. The undersigned hereby agrees to transfer and assign to your Corporation all rights in and to said pecuniary legacy and to execute and deliver to your Corporation any agreements or other instruments which may be necessary or proper to fully vest in your Corporation all rights of the undersigned to receive payment of said pecuniary legacy.

If this offer is acceptable to you, will you kindly endorse upon a duplicate original hereof the acceptance of the Corporation signed by a duly authorized officer, and return it to Carroll Paul, representing the undersigned.

—— ——.

Accepted: Longyear Heirs, Inc., by —— ——, Treasurer.

[fol. 142] "E"

——, 1933.

For value received, the undersigned, being entitled to a pecuniary legacy under Paragraphs 17, 18, 20, 21, 23, 28 or 30 of the will of Mary Beecher Longyear as modified by a certain Compromise Agreement dated April 26, 1932 and allowed as so modified by the Probate Court for Norfolk County, Massachusetts, hereby irrevocably releases and forever discharges The First National Bank of Boston, Smith Johnson and Howard N. Pease, as they are Executors under the said will of the said Mary Beecher Longyear, and the Estate of Mary Beecher Longyear, of and from all claims for the payment of the said pecuniary legacy of the undersigned and accumulated interest, if any, thereon.

Witness my hand and seal.

Witness:

.....

.....

By .....

.....

Address

St. and No. .....

City or Town .....

State .....

[fol. 143] "F"

For value received, I, —— ——, of ——, being entitled to a pecuniary legacy in the amount of $— under Paragraphs 17, 18, 20, 21, 23, 28 or 30 of the will of Mary Beecher Longyear, late of Brookline, Massachusetts, as modified by a certain Compromise Agreement dated April 26, 1932 and as thus modified allowed by the Probate Court for the County of Norfolk, Massachusetts, hereby irrevocably assign, set over and transfer and give, grant, bargain, sell and convey unto Longyear Heirs, Inc., a corporation duly organized under the laws of the State of Delaware, all my

right, title and interest in and to said pecuniary legacy, together with all interest due thereon, and together with the right to sue for and collect the same in my name or in the name of said corporation and to deliver and release annexed to this assignment to the Executors of said will.

Witness my hand and seal this — day of ——, 1933.

——— ——. (Seal.)

Witness to signature: ——— ———.

———

[fol. 144] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF GEORGE S. FULLER, IN SUPPORT OF MOTION

COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

George S. Fuller, being duly sworn, deposes and says:

1. I am an attorney at law and a member of the firm of Burnham, Bingham, Pillsbury, Dana & Gould with offices at 1 Federal Street, Boston, Massachusetts. My firm was counsel for the executors of the estate of Mary Beecher Longyear and I was in charge of all matters relating to the Federal estate tax proceedings in that estate.

2. On March 9, 1932, the estate paid to the Collector of Internal Revenue at Boston $1,100 on account of the Federal estate tax and it obtained an extension of time for filing the Federal estate tax return. Such return, Form 706, was filed by the executors with the said Collector of Internal Revenue in Boston on November 22, 1932, and on [fol. 145] that date ar additional tax of $102.94 plus interest of $8.47 was paid, making a total additional payment of $111.41.

3. On or about July 25, 1933, The First National Bank of Boston, one of the executors of the said estate of Mary Beecher Longyear, received a letter from Acting Deputy Commissioner Christy dated July 24, 1933, a copy of which is hereto annexed.

George S. Fuller.

Sworn to before me this 15th day of March, 1937. Sumner H. Babcock, Notary Public. My com'n expires Dec. 19, 1941. (Seal.)

[fol. 146] LETTER, ANNEXED TO FOREGOING AFFIDAVIT

Treasury Department, Washington

(Seal)

Office of Commissioner of Internal Revenue

Address Reply to Commissioner of Internal Revenue and refer to MT-ET—9609-EYD.

Jul. 24, 1933.

District of Massachusetts.
Estate of Mary Beecher Longyear.
Date of death—March 14, 1931.

The First National Bank of Boston, Executor, Estate of Mary Beecher Longyear, Boston, Massachusetts.

SIRS:

A final audit of the estate tax return, Form 706, in connection with supplemental data filed for the above-named estate, discloses:

(1) Estate tax shown on the return, $1,202.94.

(2) Estate tax finally determined, $1,202.94.

Accordingly, there is no deficiency in this case.

Respectfully, Adelbert Christy, Acting Deputy Commissioner.

hec.

[fol. 147] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF JAMES S. Y. IVINS, IN SUPPORT OF MOTION

DISTRICT OF COLUMBIA,
City of Washington, ss:

James S. Y. Ivins, being duly sworn, deposes and says:

1. I am an attorney at law and a member of the firm of Ivins, Phillips, Graves & Barker, located in the Southern Building, Washington, D. C.; and in the year 1933 I was a

member of the firm of Brewster, Ivins & Phillips which, as attorneys, represented the executors under the will of Mary Beecher Longyear, deceased, in conferences and negotiations with the United States Bureau of Internal Revenue in connection with the determination of the federal estate tax liability of said estate.

2. In said conferences and negotiations which I had with the Bureau of Internal Revenue with respect to said estate [fol. 148] tax liability, one of the principal matters considered and discussed was whether the federal estate tax should be computed in accordance with the will of said Mary Beecher Longyear as written, or in accordance with the terms of said will as modified by the compromise agreement executed between the executors, the residuary legatees, and the heirs of the decedent. A copy of said compromise agreement was in the possession of said Bureau of Internal Revenue at the time of said conferences.

3. I communicated to the Bureau the fact that the executors were anxious that the federal estate tax be speedily audited because it was necessary that the estate be distributed in accordance with the will and said compromise agreement as soon as possible. I requested the Bureau to pass upon the legal question before investigating the values of the property to be transferred to the heirs. This request was granted by the Bureau and thereupon a brief was filed.

4. Thereafter the legal question was referred by the Bureau to the General Counsel's office and on or about June 12, 1933, I had a conference with Judge Copes of the Interpretative Division of the office of General Counsel of the Bureau of Internal Revenue at which the legal question whether the federal estate tax should be assessed against the property to be transferred to the heirs pursuant to the will as modified by the compromise agreement was fully discussed.

5. Thereafter and on or about July 24, 1933, I was advised by the Bureau that the amount of the estate tax liability was [fol. 149] finally determined at the amount shown in the federal estate tax return as filed and that there was no deficiency in said tax. I received from the Bureau a copy of a letter from the Acting Deputy Commissioner addressed

to The First National Bank of Boston, Executor, dated July 24, 1933, a copy of which is hereto annexed.

James S. Y. Ivins.

Sworn to before me this 15th day of March, 1937. Grace E. Miller, Notary Public, District of Columbia. My Commission expires Oct. 1, 1939. (Seal.)

[fol. 150] LETTER ANNEXED TO FOREGOING AFFIDAVIT

Treasury Department, Washington

(Seal)

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to MT-ET—9609-EYD.

Jul. 24, 1933,

District of Massachusetts.
Estate of Mary Beecher Longyear.
Date of Death—March 14, 1931.

The First National Bank of Boston, Executor, Estate of Mary Beecher Longyear, Boston, Massachusetts.

Sirs:

A final audit of the estate tax return, Form 706, in connection with supplemental data filed for the above-named estate, discloses:

(1) Estate tax shown on the return, $1,202.94.

(2) Estate tax finally determined, $1,202.94.

Accordingly, there is no deficiency in this case.

Respectfully, Adelbert Christy, Acting Deputy Commissioner.

[fol. 151] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF GEORGE B. SCHOONMAKER, IN OPPOSITION TO MOTION

STATE OF NEW YORK,
County of New York, ss:

George B. Schoonmaker, being duly sworn, deposes and says:

1. He is an Assistant United States Attorney and as such is in charge of the defense of the above entitled case.

2. He denies that the property and cash received by the plaintiff were received from the estate of the plaintiff's grandmother, as asserted in paragraph numbered 5 of the affidavit of J. M. Richardson Lyeth, verified March 18, 1937, and avers that the said property and cash were received by the plaintiff from the residuary legatees under the will of the plaintiff's grandmother which was admitted to probate, the executors under the said will merely acting as agents of the said residuary legatees in transmitting and delivering the said property and cash to the plaintiff.

[fol. 152] 3. In so far as the liability of the heirs, or the liability of Longyear Heirs, Inc., to pay pecuniary legacies prior to a distribution of the property received under the settlement agreement is concerned, it is to be noted that the pecuniary legatees assigned their pecuniary legacies to the heirs or Longyear Heirs, Inc.

4. In paragraph numbered 17 of the said affidavit, it is said that the executors transferred one-half of the net residue of the estate to Longyear Heirs, Inc., as assignee of the heirs of the plaintiff's grandmother, Mary B. Longyear. The defendant intends to prove that such transfer of the executors was on behalf of the residuary legatees.

5. He denies the assertions in paragraph numbered 18 of the said affidavit and avers that the said distribution and payments were made, under the law of Massachusetts, by the executors on behalf of the residuary legatees.

6. The federal estate tax return filed by the executors of the estate of the said Mary Beecher Longyear was filed on November 21, 1932.

7. Annexed hereto and marked Exhibit A is a copy of the brief filed by the executors of the said estate in connection with the conferences mentioned in paragraph 21 of the said affidavit; and annexed hereto and marked Exhibit B is a copy of the decision of the General Counsel, Bureau of Internal Revenue, accepting as true the facts set forth in the federal estate tax return filed by the said executors and accepting the views contained in the said brief.

[fol. 153] 8. He has been unable to obtain any information relative to the accuracy of the statements contained in the last two sentences of paragraph numbered 22 of the said affidavit.

9. He admits for the purposes of this motion the correctness of the computations made in paragraph numbered 24 of the said affidavit relating to the amount of the additional federal estate tax. He avers, however, that the value of the units of stock distributed to the heirs was far greater than $250.00 per unit, in view of the valuation placed upon the said units in the said compromise agreement and in the inventory made by the said executors.

10. The said estate was fully distributed by the executors thereof prior to October 16, 1936.

11. The plaintiff is estopped to assert or claim that any portion of the property received by him pursuant to the said compromise agreement was in the nature of an inheritance and was received by him as a part of the estate of the said Mary Beecher Longyear for the reason that the plaintiff is bound by the assertions and contentions made by the said executors to the Commissioner of Internal Revenue, upon which assertions and contentions, the Commissioner relied and acted, that the said property was received by contract from the residuary legatees.

12. If this court should hold that the deduction from the gross estate of the property received by the heirs under the [fol. 154] compromise agreement was correctly taken and allowed in determining the estate tax, then under those circumstances, the defendant asserts that Section 22 of the

Revenue Act of 1932 is intended to exclude from gross income as exempt from income tax only the value of property secured by devise, bequest, or inheritance under such circumstances and conditions as to make such bequest, devise, or inheritance subject to estate tax; that, accordingly, if the property so received by plaintiff by virtue of the compromise agreement was not secured by bequest, devise, or inheritance so as to leave it subject to an estate tax, it was not so secured by legacy, devise, or inheritance so as to leave it exempt from income tax under the provisions of Section 22 of the Revenue Act of 1932.

(Sgd.) George B. Schoonmaker.

Sworn to before me this 23d day of March, 1937. Armand Chankalian, Notary Public, New York Co. Clerk's No. 343, Reg. No. 7C494. Commission expires March 30, 1937.

[fol. 155] EXHIBIT A TO AFFIDAVIT

May 31, 1933.

Re Estate of MARY B. LONGYEAR—Federal Estate Tax

Brief in Behalf of the Executors to the Point that the Amount of the Deduction for the Bequests to the Charities is to be Based Upon the Terms of the Will Rather than the Compromise Agreement

The Executors beg leave to submit the following brief covering the points raised at the conference held on May 29th in Washington with Messrs. Boris, Srygley and Higgins of the Legal Committee of the Miscellaneous Tax Unit.

The statute authorizes a deduction of the "amount of all bequests" etc. to charities. It was suggested by one of the members of the Committee at the conference that this meant the "value" of the bequest in the sense of the value of the right to the bequest, and that if a question were raised as to the right of the legatee to the bequest the "value" of the bequest would thereby be reduced accordingly. Clearly, however, such could not be the meaning of the statute. The "amount" of the bequest is the "amount" of the property bequeathed and is measured by the value of the property bequeathed and not the value of the right to the bequest.

The question whether or not there is a "bequest" and what property is bequeathed is a probate matter and is determined by the probate court and law of the state. If the [fol. 156] "bequest" is to a charity the amount of it is deductible, and the amount in dollars and cents is merely a matter of appraisal of the particular property which passes by virtue of the state law as to testamentary succession.

"The right to succeed to the property of the decedent depends upon and is regulated by state law," and the extent and character of the interests taken by the legatees is also a matter of state law.

Uterhart v. United States, 240 U. S. 598 at 603;
Boal v. Metropolitan Museum of Art, 19 F. (2) 454 at 459 (2nd C. C. A.);
Sutherland v. Selling, 16 F. (2) 865 at 868 (9th C. C. A.);
Hidden v. Durey, 34 F. (2) 178 (D. C. N. D. N. Y.) (involving a federal estate tax).

In the Boal case the court said at p. 458:

"As long as the decree admitting the will and trust deed to probate is effective, the federal courts, which have no probate jurisdiction, should recognize the instruments as making a testamentary disposition of a testator's property."

It is the settled law of Massachusetts, as it is in several other states including New York, Illinois, Iowa, Nebraska, California and Tennessee, that where a will is allowed pursuant to compromise agreement the will is decreed to be a valid will and is admitted to probate as written, and that [fol. 157] the rights created by that agreement, in so far as they differ from the provisions of the will, arise by virtue of the contract between the beneficiaries and are not testamentary rights, but are based solely on contract. Such parties take not from the decedent, but, in legal contemplation, by assignment from the legatees.

In Ellis v. Hunt, 228 Mass. 39 the court establishes the following principle as the law of Massachusetts—

"The agreement for compromise, even when approved by decree of the court, is not in any accurate sense a modification of the will. The will as an entirety in all its parts is

established and admitted to probate. The Court does not undertake to admit to probate a part of the will and to refuse to allow another part. * * * The agreement is *not* incorporated into the will. The will stands by itself. Although the practice is to insert a clause in the decree of the court to the effect that the estate is to be administered in accordance with the agreement, yet the rights of the parties so far as they rest upon the agreement are contractual and not testamentary."

In the Longyear estate, therefore, the will was probated as written. Under the will the entire residue and all the real estate was bequeathed to the charity. The right of the heirs under the compromise agreement was contractual and not testamentary. Whatever the heirs get is solely by virtue of their contract with the charity. They get it by common law contract and not by virtue of any probate law or right of succession, testamentary or otherwise.

[fol. 158] As further pointed out in Ellis v. Hunt—(italics ours):

"It is a change made, not in the expression of the will but in the volition of legatee or devisee as to what he is to do with the benefaction which he has received under the will. The Legislature has never permitted heirs at law and legatees to make a new will for a testator. There would be a certain anomaly in recognizing testamentary power and in providing at the same time that after the maker of the will had died and his testamentary power gone forever, his disposition might be entirely frustrated. That would be quite a different matter from facilitating the making of valid contracts by competent legatees and devisees as to what they will do with that which they may receive under a will, subject to the supervisory power of the court to see that such contracts are just and reasonable. *Agreements of this nature are entirely valid outside of the statute.* * * * The will in the case at bar contains direct gifts of real estate as well as of personal property to the trustees. *When the will is established, the legal title vests in them* * * *. *This inevitable effect of succession of legal title cannot be eliminated by contract between cestuis que trust and strangers, even though the strangers be the heirs at law of the testator.*"

It thus is made perfectly clear that in Massachusetts the legal effect of a compromise, no matter how it may be phrased or worded, is that it does not change the succession [fol. 159] of the property from the decedent, but solely affects the disposition of that property, after the succession. The fact that the executor is directed to carry out the terms of the compromise agreement does not destroy any of the "bequests". The executor is merely acting for the legatee in carrying out the legatee's agreement to pay over to someone else that which the legatee has agreed to pay or cause to be paid to that someone else. This rule has also been established as to Massachusetts inheritance taxes.

Baxter v. Treasurer and Receiver General—209 Mass. 459.

As pointed out by the Court in the case of Estate of Henry Graves, 242 Ill. 212 (Illinois law being the same as Massachusetts as to the effect of the probate of a will pursuant to a compromise agreement):

"No changes of title, transfers or agreements of those who succeed to the estate, among themselves, or with strangers, can affect the tax. All questions concerning it must be determined as of the date of the decedent's death."

In the cases of Estate of Valentine Janson and Lancaster Trust Co., 3 B. T. A. 296 and 298, the Government was upheld upon just such a contention.

That the Federal Estate tax is to be determined as of the moment of the testator's death was settled by the Supreme [fol. 160] Court in the case of Ithaca Trust Co. v. United States, 279 U. S. 151. In that case there was a gift to a charity of the remainder of a trust after a life estate. The life beneficiary had an expectancy of life of fifteen years at the time of the testator's death, but in fact died within one year. In holding that what took place after the death cannot affect the tax the court (Mr. Justice Holmes speaking) made the following statements which are particularly apt in our case:

"The tax is on the act of the testator not on the receipt of property by the legatees. Therefore the value of the thing to be taxed must be estimated as of the time when the act is done."

In another Illinois case, People v. Upson, 338 Ill. 155 at 151, the court said:

"When the entire residuary estate vests in residuary legatees at death, if they agree to pay a certain sum to one who agrees not to contest the will, such sum is taxable to the residuary legatees and not to the party to whom the money was paid."

To the same effect see Estate of Wells, 142 Iowa 255.

In Matter of Cook, 187 N. Y. 253, (the New York law being also the same as the Massachusetts law) the court said (Italics ours):

"The compromise did not change the will * * *. The will stands as it was written, and the most solemn instru- [fol. 161] ment, executed by all parties interested, could not convert a *bequest* to the nephews and nieces into a *bequest* to the widow * * *. A succession tax is measured by the legal relation which the legatee bears to the testator and is not affected by the relation which an assignee of the legatee bears to him. Here the legatees took the residuum under the will. They succeeded the testator in the ownership thereof and their succession gives rise to the tax. *The widow did not take the residue from the testator, for he did not give it to her. She took as assignee, not as legatee.*"

No different principles are involved in the Federal estate tax than are involved in the state succession taxes, so far as the question of the effect of a compromise agreement are concerned. The Federal Estate tax is based on the value of the property passing from the decedent, but a deduction is allowed of so much of that property as passes by bequest from the decedent to a charity. It is the situation as of the moment of the testator's death that controls the estate tax, even as it does the inheritance tax. Transfers by the parties thereafter cannot affect it.

It was further suggested by one of the Committee at the conference that in some states, New York for example, bequests to charities over a certain amount are subject to the right of the widow and children to claim a part of the gift, and that where such a claim was made and an amount paid pursuant to such claim, it was the practice of the Bureau to [fol. 162] reduce the bequest to the charity by the amount so paid.

We submit, however, that such practice affords no precedent or criterion for our case. Where such a claim is made by a widow or children, the claim is a claim of right, and when made the widow or child succeeds to the amount so claimed by virtue of the laws of succession of the state, and take directly from the testator by virtue of the statute. True, the will may be allowed in those cases as written, but what passes to the widow passes notwithstanding the will but by statute. She does not get it by virtue of any contract with the charity. It is a transfer to her by death, directly from the decedent, and the amount bequeathed by the will to the charity is, by a law of succession, reduced by the amount which so passed directly to the widow.

A claim made by an heir that a will is invalid by reason of lack of testamentary capacity or because of undue influence is not a claim of a right to succeed to property. It is merely a denial of the validity of the will, and raises merely an issue of fact. Because of a consideration paid or to be paid to such heir he withdraws from further contest on that issue and the court, after hearing the witnesses' testimony as to the execution of the will and the legal capacity of the testator, thereupon, if satisfied by such evidence, enters a decree establishing the validity of the will. In confirming the compromise agreement the Court merely directs that the Executor carry out in behalf of the legatee that which the legatee has, in legal contemplation, agreed to do, to wit,—to make [fol. 163] the payment to the heir which he (the legatee) has agreed shall be paid to the heir in consideration of the heir's withdrawal from further contesting the issue of fact. Without intimating that such was the fact in this case, it is nevertheless a matter of almost common knowledge that in a great many cases such an issue of fact is raised by the heirs with the expectation that a consideration will be paid for his withdrawing from contesting the issue, and without any substantial expectation of ultimately prevailing upon the issue if forced to trial.

Obviously, then, we submit, payments made to an heir under a claim of a right to succession are fundamentally of a different nature than payments to an heir for refraining from further contesting an issue of fact. The former, being claimed as of right, are in legal contemplation transfers from the decedent to the claimant, while the latter are clearly not such transfers but are payments made by or at the direction of the legatee to the claimant.

We were asked at the conference whether, if a legatee renounced his right to receive a legacy, he would still be required to pay an inheritance tax on that legacy. Undoubtedly he would not be required to pay the tax in that case for there is no legacy unless it is accepted. However, we have no such situation in our case. The legal effect of a compromise agreement, as established by the decisions of the Massachusetts Supreme Court, is that the will is established and the legacies are accepted and the only testamentary succession is from the testator to the legatee. Whatever payment is made to the claimant in a case like ours [fol. 164] is made by reason of the contract and whatever the claimant receives under that agreement which is not given to him by the will itself comes to him from the legatee and not from the decedent. The settlement of a will contest by allowing the will pursuant to a compromise agreement is not a renunciation by the legatee and the tax situation is not modified but must be governed by the provisions of the will itself. We know of no Massachusetts cases on this point, but such is the law in New York.

Estate of Levy—(Surrogate's Court)—N. Y. Law Journal May 12, 1926.

Estate of Kyle—N. Y. County Surrogate Court—March 20, 1931.

Respectfully submitted, George S. Fuller, Attorney for the Executors.

[fol. 165] EXHIBIT B TO AFFIDAVIT

Noted by Deputy Commissioner

GC:I:REC.
A-267017.

Jul. 14, 1933.

In re Estate of MARY BEECHER LONGYEAR, District of Massachusetts, Date of Death—March 14, 1931

Acting Deputy Commissioner Christy:

With your memorandum (MT-DC-JEK) of June 6, 1933, the administrative file in the above estate was forwarded to this office for an opinion on the question hereinafter stated.

It appears that the decedent, Mary Beecher Longyear, a resident of Massachusetts, died March 14, 1931, leaving a will whereby, among other things, she devised and bequeathed all of her real property and the whole of her residuary estate to charities. Before the will had been admitted to probate numerous controversies respecting its validity arose between those persons who were the heirs at law and next of kin of the decedent and who were entitled to the decedent's entire estate under the laws of descent and distribution of intestate estates, on the one hand, and the charities, who claimed as devisees and/or legatees under the will, on the other hand.

As a result of such controversies, the executors named in the will; the Attorney General of Massachusetts; the said heirs at law and next of kin and the said charities entered into a written agreement of compromise dated April 26, [fol. 166] 1932, wherein it was agreed that "The said will shall be admitted to probate and letters testamentary shall issue forthwith; and the executors shall forthwith qualify; and the estate of the decedent shall be administered and distributed as" provided in the agreement. Accordingly the will was admitted to probate as written, the executors qualified as such, and letters testamentary were issued to them. As a result of the will and compromise agreement the charities will receive approximately $900,000, being about one-half of the amount which passed to them under the will, and the said heirs at law or next of kin will receive the remainder of such amount.

The question presented is whether the estate is entitled, under section 303(a) (3) of the Revenue Act of 1926, to a deduction in the full amount which passed under, or was transferred by the will to the charities or only in the amount which the charities will receive as a result of the will and agreement of compromise.

Regulations 70 (1929 edition) provide:

"Art. 44. *Transfers for public, charitable, religious etc., uses.—Deduction may be taken of the value of all property transferred by will* or by the decedent in his lifetime not to exceed the value of the transferred property required to be included in the gross estate * * *." (Italics supplied.)

The statute upon which article 44, supra, is based and which is applicable here, is as follows:

[fol. 167] "Sec. 303. For the purpose of the tax the value of the net estate shall be determined—

"(a) in the case of a resident, by deducting from the value of the gross estate— * * *

"(3) The amount of all bequests, legacies, devises, or transfers, * * * to or for the use of any corporation organized and operated exclusively * * * for charitable * * * purposes * * * no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees * * * but only if such contributions or gifts are to be used by such trustee or trustees * * * exclusively for * * * charitable * * * purposes * * *. The amount of the deduction under this paragraph for any transfer shall not exceed the value of the transferred property required to be included in the gross estate; and * * *." (Revenue Act of 1926.)

The rule is established by the great weight of authority (see Gleason & Otis, Inheritance Taxation, p. 50) including Baxter v. Stevens, 209 Mass. 459, 95 N. E. 854, that in cases like the instant case where decedents' wills, as written, are admitted to probate as a result of agreements of compromise, the full amounts of the devises and bequests pass under the wills as written to the beneficiaries therein named, and that in such cases the objectors to the wills do not receive under the wills, but under the compromise agreements from the beneficiaries.

[fol. 168] It follows, in the opinion of this office, that the full amount of the devise and bequest involved in the Longyear estate passed under or was transferred by the decedent's will to the charities; that the amount thereof which the said heirs at law and next of kin are to receive will be received by them not under the will but under the compromise agreement, and that the deduction should be allowed in the full amount of the devise and bequest provided the charities meet all the requirements of section 303 (a) (3), supra.

Subject to what is hereinafter said, the Massachusetts rule which, as has been stated above, represents the great weight of authority should be followed in all cases where, as in the instant case, wills are admitted to probate as a result of compromise agreements. That rule, however, should not be followed in cases arising in Rhode Island or in other

jurisdictions where the laws are similar to the laws of Rhode Island which provide that in cases where wills are admitted to probate as a result of compromise agreements the estates of such deceased persons shall be administered and disposed of in accordance with the provisions of the wills as modified by the agreements. In Rhode Island, and in other jurisdictions where the laws are similar to the laws of Rhode Island only the amounts received by charities under a will as modified by an agreement of compromise should be allowed as a deduction.

The administrative file in the estate is herewith transmitted.

E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue.

[fol. 169] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUPPLEMENTAL AFFIDAVIT OF J. M. RICHARDSON LYETH, IN SUPPORT OF MOTION

STATE OF NEW YORK,
County of New York, ss:

J. M. Richardson Lyeth, being duly sworn, deposes and says:

1. On January 21, 1935, a Revenue Agent from the Bureau of Internal Revenue came to deponent's office with a copy of the decision of the Board of Tax Appeals in the case of Bernard O. Kearney and with the 1932 income tax returns of plaintiff and his brother, J. M. Richardson Lyeth, Jr. The Revenue Agent stated to deponent that the Bureau, on the authority of that decision, claimed that the money received from the estate of Mary B. Longyear in 1932 by each of the boys was taxable as income. Deponent argued at considerable length with the Revenue Agent that any property received by the heirs was an inheritance from their grandmother's estate. The Agent requested a waiver, but [fol. 170] deponent tentatively declined to give it on the ground that, as general guardian of both boys, he had received no money from the estate of Mary B. Longyear during the year 1932. Deponent is informed and believes that

a similar request was made of Robert D. Longyear, one of the other heirs of Mary B. Longyear and that a waiver on his behalf was given and subsequently an assessment was made against said Robert D. Longyear for a deficiency in 1932 income taxes, based upon the receipt by him of a sum of money in 1932 from the executors of the said estate of Mary B. Longyear.

2. On December 18, 1935, deponent received from the Commissioner of Internal Revenue a notice of proposed deficiency, Form 870, dated December 17, 1935, addressed to the plaintiff, stating "A review of your income tax return for the year 1933 discloses a deficiency of $56,389.65 as shown by the annexed statement." By the terms of said letter the plaintiff was granted ten days within which to file a protest against the proposed income tax liability. The statement attached thereto showed that the deficiency was based on an addition to gross income of the sum of $141,484.03, cash and units of stock received in 1933 from the executors under the will of Mary B. Longyear. This is the deficiency which is the basis of this suit.

3. On December 27, 1935, there was sent to Washington a protest on behalf of the plaintiff executed by deponent as guardian, copy of which is hereto annexed and marked Exhibit "A."

[fol. 171] 4. On March 23, 1936, pursuant to the request in said protest, a conference was had at the Bureau of Internal Revenue which deponent attended. At that conference substantially all of the arguments were presented by deponent that have been and will be presented in this action. Particular stress was laid upon the argument that the amounts received by the heirs of Mary B. Longyear were inheritances and an effort was made to distinguish this case from the Kearney case on the ground, among others, that the property was received by the heirs direct from the executors and not from the residuary legatee.

5. On April 25, 1936, a memorandum of law was sent to the Commissioner of Internal Revenue with a covering letter signed by my associate, Ben R. Clark, copy of which is hereto annexed and marked Exhibit "B." Said memorandum of law consisting of thirty-two pages, set forth substantially all the arguments that will be presented in this action, but particularly stressed the fact that the property

was received directly from the executors pursuant to an order of the probate court and not from the residuary legatees, and was therefore an inheritance.

6. On May 7, 1936, a second conference before the Bureau was had at which the question whether or not the property received by Mrs. Longyear's heirs was an inheritance was fully discussed.

7. The ninety-day notice of deficiency in income taxes for the year 1933, addressed to the plaintiff in this case was dated July 28, 1936, and was received by deponent July 29, 1936.

[fol. 172] 8. Petitions were duly filed in the Board of Tax Appeals in respect of similar deficiencies for income taxes for the year 1933 on behalf of Abby Beecher Roberts, Helen Longyear Paul and John M. Longyear, Jr., three of the living children of Mary B. Longyear on October 22, 1936. Said petitions all contained the following prayer:

"(d) The petitioner prays that the Board may find that the property and cash distributed to her by the executors of the last will and testament of Mary Beecher Longyear was in the nature of an inheritance, bequest or gift within the meaning of Section 22 (b) of the Revenue Act of 1932."

(Signed) J. M. Richardson Lyeth.

Sworn to before me this 22nd day of March, 1937. Christopher J. Heavey, Jr., Notary Public, Kings County, N. Y. Kings Co. Clk's No. 77, Reg's No. 8081. N. Y. Co. Clk's No. 666, Reg's No. 8H896. Nassau County Clerk's No. 8H22. Commission expires March 30, 1938.

[fol. 173] EXHIBIT "A" TO AFFIDAVIT

PROTEST

Munro Longyear Lyeth,
Guardian, J. M. Richardson Lyeth,
No. 2 Wall Street,
New York City

Commissioner of Internal Revenue, Washington, D. C.

SIR:

Receipt is acknowledged of your letter dated December 17, 1935, bearing the symbols IT:AR:B-2 MEK, in which you propose the assessment of a deficiency in tax on the federal income tax filed by the undersigned as guardian for Munro Longyear Lyeth for the calendar year 1933, in the amount of $56,389.65. This proposed deficiency is the result of an adjustment made in the gross income by adding the alleged value of property distributed under the will of the taxpayer's grandmother, Mary Beecher Longyear, of Boston, Massachusetts.

Findings to Which Exception is Taken

The addition to taxable income of $141,484.03, alleged value of property and cash distributed under the will of Mary Beecher Longyear.

Summary Statement of the Grounds Upon Which the Taxpayer Relies in Connection With Said Exception

The taxpayer, Munro Longyear Lyeth, is a grandson of Mary Beecher Longyear, who died a resident of Brookline, [fol. 174] County of Norfolk, Commonwealth of Massachusetts, on March 14, 1931, leaving an alleged will dated December 7, 1928. The taxpayer's mother, who was a daughter of said Mary Beecher Longyear, died in 1924. The taxpayer and the other heirs of said Mary Beecher Longyear duly contested the probate of said will. Thereafter a compromise agreement was duly entered into by all of the parties to said contest, including William H. Best, acting as guardian ad litem for the taxpayer. Pursuant to the law of Massachusetts, said compromise agreement was

duly approved by the Probate Court and the will with said compromise agreement was duly admitted to probate, and Letters Testamentary were duly issued to the executors named in said will.

The property and cash referred to in your said letter were distributed by the executors under the last will and testament of Mary Beecher Longyear, and this distribution was made pursuant to the order of the Probate Court. No property or money was distributed or paid to this taxpayer by any of the legatees named in the will of said Mary Beecher Longyear.

The undersigned respectfully submits that none of said property was taxable income to said Munro Longyear Lyeth for the year 1933.

An oral hearing for the discussion of the question raised in your letter of December 17th is hereby requested, but only in event that the proposed deficiency is not withdrawn as the result of this protest.

Dated, New York, December 20, 1935.

J. M. Richardson Lyeth, Guardian for Munro Longyear Lyeth.

[fol. 175] EXHIBIT "B" TO AFFIDAVIT

April 25, 1936.

Commissioner of Internal Revenue, Washington, D. C.

In re Abby Beecher Roberts, et al. 1933

IT:E:C. GC

DEAR SIR:

I beg to enclose herewith a memorandum of law setting forth our contentions with respect to the question of the taxability of the amounts received in 1933 by the heirs of Mary B. Longyear from the executors of her estate.

At the time of our conference at your office on March 23rd it was suggested that another conference be held after we had presented in memorandum form our arguments with respect to the questions of law involved. Mr. Mayo Shattuck wishes to attend this conference on behalf of Mr. Robert D. Longyear and requests that if possible the same be set for either May 7th or 8th at which time he will be

in Washington for the Law Institute meetings. Will you be good enough to advise me whether the conference may be arranged for either of these dates.

I am uncertain whether you wish this memorandum to be filed in triplicate, and I am therefore enclosing only the original copy. If you wish additional copies I shall be glad to furnish the same.

Very truly yours, Ben B. Clark.

Enclosure.
BBC:L.

[fol. 176] In United States District Court

[Title omitted]

Supplemental Affidavit of George B. Schoonmaker, in Opposition to Motion

State of New York,
County of New York, ss:

George B. Schoonmaker, being duly sworn, deposes and says:

1. He is an Assistant United States Attorney and as such is in charge of the defense of the above entitled case.

2. He is submitting this supplemental affidavit for the purpose of presenting to the Court certain material facts which were not included in his affidavit of March 23, 1937 and for the purpose of pointing out that the plaintiff's motion for summary judgment cannot be granted if it is necessary for the Court to determine whether the plaintiff and other heirs of the decedent Mary Beecher Longyear would have become entitled to her estate upon the setting aside of the will which the testatrix executed on December 7, 1928.

[fol. 177] 3. According to the statements made by the attorney for the proponents of the will at the hearing on the motion to frame jury issues mentioned in paragraph numbered 8 of the affidavit of J. M. Richardson Lyeth, Esq., submitted in support of the plaintiff's motion, the decedent Mary Beecher Longyear had executed several wills prior to the execution of the will which was admitted to probate.

The statement of the attorney for the proponents with respect to these prior wills is in part as follows:

"This plan of hers (Mary Beecher Longyear) takes its origin, as we find, in about 1917. It appears in letters written to her husband discussing it with him, stating that she wanted to devote her share of his estate to the purposes of Christian Science. She made will after will containing minor changes, for apparently she preferred to have new wills made rather than execute codicils. She had new wills made from time to time, but always expressing the same general purpose, making small gifts to her children, reciting that they had ample means of their own, had their share of the father's estate, and leaving the balance to this Christian Science trust which she had conceived the idea of at least as far back as 1917.

"Her husband cooperated in the plan. He knew all about it; he agreed to it. When he made his will, she being still living, he provided that one-third of his property, if she died first, should go in accordance with her will, and her [fol. 178] will then in existence contained the same general plan of the distribution of property as does the last will, contained a gift of the residue and of the house to the Zion Research Fund." (Stenographic minutes, pp. 118-119.)

4. The attorney for the proponents of the will further stated at pages 139-140 of the stenographic minutes:

"In 1926 she went for the first time to The First National Bank. Mr. Olsen drew the will of August of that year. She recorded during the year, by the way, many, many references to conferences with counsel over her will, various ideas which she had for safeguarding the purposes of the trust. Finally, in August, 1926, and again in October, two wills are drawn, which are very much like the final will even in detail. All the way through, all these wills are in substance like the final will, and these two are almost identical, particularly the last one, . . .

"Now, if she was of unsound mind when the will of 1928 was drawn, we go back to substantially the same will in 1926. If she is proved to be of unsound mind in October, 1926, we go back to August, 1926. We have a series of wills all the way back to 1920, all taking the money away from these contestants and giving it to the cause of Christian Science."

5. Your deponent is unable to set forth at the present time the terms of the aforesaid previous wills of the decedent [fol. 179] Mary Beecher Longyear and is unable to state whether or not they were revoked by any other means than subsequent wills.

George B. Schoonmaker.

Sworn to before me this 30th day of March, 1937. Armand Chankalian, Notary Public, New York Co. Clerk's No. 343, Reg. No. 7C494. Commission expires March 30, 1937.

IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION GRANTING MOTION FOR SUMMARY JUDGMENT

Appearances:

Messrs. Carter, Ledyard & Milburn, Attorneys for Plaintiff; J. M. Richardson Lyeth and Allin H. Pierce, Esqs., of Counsel.

[fol. 180] Lamar Hardy, U. S. Attorney, for Defendant; George B. Schoonmaker, Esq., of Counsel.

COXE, D. J.:

This is a motion for summary judgment. The action is to recover an alleged overpayment of income taxes for the year 1933 amounting, with interest, to $65,005.68. There is no dispute in the essential facts. The questions presented are (1) whether the property forming the basis of the assessment was properly treated as taxable income, and (2) whether the affirmative defenses in the answer have any substance.

The plaintiff is a grandson of Mary B. Longyear, who died March 14, 1931, a resident of Massachusetts, leaving as her heirs four surviving children, and the plaintiff and his brother, sons of a deceased daughter. The estate was initially inventoried at more than $3,000,000. By her will, the decedent bequeathed to the plaintiff and his brother each a portrait, a rug, and $5,000; to the four surviving children certain rugs, portraits and other personalty; and to two of

the four children sums of $10,000 and $5,000 respectively. The entire residuary estate was bequeathed to trustees of a so called Endowment Trust, under which the income was payable to another set of trustees under another trust instrument referred to as Longyear Foundation. The main purpose of this latter trust was to preserve the records of the earthly life of Mary Baker Eddy, the founder of the Christian Science religion.

[fol. 181] The probate of the will was objected to by all of the heirs upon various grounds, including lack of testamentary capacity and undue influence; and the Probate Court, after a full hearing, directed that issues be framed for submission to a jury.

In this situation a settlement was arrived at, and a compromise agreement, dated April 26, 1932, entered into and signed by the legatees, devisees, executors under the will, the heirs, and the Attorney General of Massachusetts. This agreement provided in substance that the specific and pecuniary bequests to individuals should be enforced, that the specific bequest to charities and the bequest of the residuary estate to charitable institutions should be disregarded, and that the net residue of the estate should be divided, one-half to the charities and one-half to the heirs.

The compromise agreement was approved by the Probate Court, pursuant to the provisions of the Massachusetts statute, and a decree entered on April 26, 1932, admitting the will to probate, issuing letters testamentary to the named executors, and directing them "to administer the estate of said deceased in accordance with the terms of said will and said agreement of compromise".

The depression was then at its height, and the executors had difficulty in finding the necessary funds to discharge the pecuniary legacies, which, under the terms of the compromise agreement, were entitled to priority in payment before there could be any distribution of the residue. The heirs thereupon undertook to finance one-half of the pecuniary legacies, and the residuary legatees the other half. [fol. 182] For their part of this financing, the heirs formed a corporation known as Longyear Heirs, Inc., to which they assigned their respective interests in the estate in exchange for common stock. Preferred stock in the corporation was issued to the pecuniary legatees.

On July 26, 1933, the executors turned over to Longyear Heirs, Inc., as assignee of the plaintiff, the entire distributable share of the plaintiff in the residuary estate consisting of $80.17 in cash, and 358 units representing a corresponding number of shares of various corporations owned by the decedent prior to her death. The commissioner valued this distributable share of the plaintiff at $141,484.03, and treated the whole amount as income for the year in which it was received. The plaintiff was accordingly assessed an additional tax of $56,389.65, which he paid on October 16, 1936, together with interest of $8,616.03.

The plaintiff was an heir of Mrs. Longyear, and would have been entitled to share in her estate if she had died intestate. In contesting the will, he was thus seeking to enforce rights which had come to him by inheritance from the decedent. His chances of success were good. This was fairly well indicated when the Probate Court granted the motion to frame jury issues. Smith v. Patterson, 286 Mass. 356. If the heirs had gone to trial, and obtained a decree denying probate, none of the property which the heirs received would have been classed as income. Yet, now, after the consummation of a settlement, under which the heirs receive only half of the residuary estate, the Government chooses to treat this half as all income.

[fol. 183] The contention of the Government is based on the proposition that the plaintiff and the other heirs took by purchase and not under the will. That, undoubtedly, is the law of Massachusetts. Brandeis v. Atkins, 204 Mass. 471; Baxter v. Treasurer, 209 Mass. 459; Ellis v. Hunt, 228 Mass. 39. It is also the law of New York, Matter of Cook, 187 N. Y. 253. But it is only a legal fiction. And it is not controlling in the determination of the character of property for income tax purposes. Merchants v. Smietanka, 255 U. S. 509; Irwin v. Gavit, 268 U. S. 161; Tylor v. U. S., 281 U. S. 497; Barnet v. Harmel, 287 U. S. 103; Helvering v. Butterworth, 290 U. S. 365; Blair v. Commissioner, 300 U. S. 5; Untermyer v. Commissioner, 59 Fed. (2) 1004. That is a question for the federal court to decide for itself irrespective of local law: it depends on the inherent nature of the claim compromised, not on artificial local rules as to the effect of the compromise agreement. Central v. Commissioner, 79 Fed. (2) 697; Farmers v. Commissioner, 59 Fed. (2) 912; Strother v. Commissioner, 55 Fed. (2) 626.

The definition of income in Eisner v. Macomber, 252 U. S. 189, 207, is as follows:

"'Income may be defined as the gain derived from capital, from labor, or from both combined,' provided it be understood to include profit gained through a sale or conversion of capital assets, to which it was applied in the Doyle case" (247 U. S. 179, 185).

The property received by the plaintiff is not within this [fol. 184] definition. It was not a gain derived from capital. The plaintiff was not investing his capital but trying to obtain it. There was no gain, either, from labor. The will contest was not entered into for profit. Neither was the legal expense deductible as a loss. Merriman v. Commissioner, 55 Fed. (2) 879. No more was it productive of income. I do not think, therefore, that the property received was in any sense income.

The Government relies heavily on the case of Bernard O. Kearney, 31 B. T. A. 935, decided by one member of the Board of Tax Appeals. In that case, the testator left two-thirds of his residuary estate to charitable organizations, and the agreement of settlement provided for the payment by these organizations of $700,000 directly to the heirs, including the taxpayer. The Board member thought that the taxpayer realized a gain because he had rights which "cost him nothing," and these rights were given up "in exchange for $23,333.34." The fallacy in the argument is that no rights were given up which resulted in gain. The property which the petitioner sought to recover was something which he believed he was entitled to by inheritance. When the litigation was settled he only received part of what otherwise would have come to him if the will had been overthrown. I think this should have been held to be capital and not income.

It is unnecessary to decide whether the property received by the plaintiff is within the exemption provision of Section 22 (b) (3) of the Revenue Act of 1932; it may still be non-taxable although not covered by any specific exemption. In Gould v. Gould, 245 U. S. 151, it was held that [fol. 185] alimony was not income even though not expressly exempted. The same was true in Edwards v. Cuba, 268 U. S. 628, where it was held that money subsidies granted by the Cuban Government to an American railroad

company to promote rail construction did not constitute income. Central v. Commissioner, 79 Fed. (2) 697, is similar. In that case, an officer of the taxpayer railroad organized a number of corporations through which he surreptitiously did business with the taxpayer. He was thus able to make large secret profits. The railroad sued, and a settlement was thereafter effected, by which the railroad received a considerable amount of money and property. It was held that this recovery "was in the nature of a windfall," and not income.

The two affirmative defenses remain for consideration. The first of these is stated to be "by way of set-off and recoupment," and alleges as follows:

"That if the said property received by the plaintiff and other heirs under the said compromise agreement was not a proper deduction from the gross estate for purposes of the estate tax, the amount that was due and owing from the plaintiff to the United States as transferee and distributee on October 16, 1936, exceeded $65,005.68."

The second defense is "by way of estoppel," and alleges that the plaintiff is estopped from recovering because the executors of the Longyear estate claimed and secured a deduction of the entire residuary estate in the federal estate [fol. 186] tax proceedings on the ground that the property passed under the will to charitable organizations.

The federal estate tax return was filed on Nov. 22, 1932. In it the executors claimed as a deduction the value of the residuary bequest in the will as originally written, on the ground that the property went to a charitable organization. The Bureau disputed this claim, but after considerable discussion with the executors, the General Counsel of the Bureau ruled "that the deduction should be allowed in the full amount of the devise and bequest." On July 24, 1933, the Acting Deputy Commissioner advised the executors that a final audit disclosed that there was no deficiency. This determination has never been changed, and is in full force today.

The three-year limitation period for the assessment of federal estate taxes against the executors expired Nov. 22, 1935. (Section 310 [a] Rev. Act 1926.) The additional one year period for assessment against a transferee ex-

pired on Nov. 22, 1936. (Section 316 [b] [1] Rev. Act 1926.) When the present action was started, therefore, the statute of limitations had run not only against the executors but against the plaintiff as transferee.

I do not think the case is one for the application of the doctrine of equitable recoupment. There certainly is no basis for a set-off or counterclaim. Stone v. White, decided by the Supreme Court, May 24, 1937. I do not find, either, any equitable reasons for denying recovery. The estate tax against the Longyear estate has long since been settled [fol. 187] and paid, and the statute has run against any reopening of the proceedings. The decision of the Bureau was arrived at deliberately after a full showing of the facts, and a careful consideration of the law. There is nothing whatever to support any claim of estoppel, such as found in Stearns v. U. S., 291 U. S. 54. And even to this day, the Government has not indicated that it considers the ruling by the Bureau on the claimed deduction unsound. Neither has there been any assessment against the plaintiff as a transferee. This is a prerequisite to the enforcement of such a claim. Phillips v. Commissioner, 283 U. S. 589. I do not think, therefore, that either of the alleged affirmative defenses is legally sufficient.

It follows that the motion of the plaintiff for summary judgment should be granted.

July 22, 1937.

(Sgd.) Alfred C. Coxe, U. S. D. J.

[fol. 188] In United States District Court

[Title omitted]

Order Granting Motion for Summary Judgment—July 26, 1937

The plaintiff in the above entitled action having made a motion for an order striking out the answer of the defendant herein and directing that judgment be entered herein in favor of the plaintiff pursuant to Rule 113 of the New York Rules of Civil Practice,

Now, on reading the complaint, the answer, the reply and the amended answer herein, and on reading and filing plain-

tiff's notice of motion dated March 18, 1937, returnable March 23, 1937, and admission of service thereof, the affidavit of J. M. Richardson Lyeth, sworn to the 18th day of March, 1937, and Exhibits "A," "B," "C" and "D" thereto annexed, the affidavit of George S. Fuller, sworn [fol. 189] to the 15th day of March, 1937, and the exhibit thereto annexed, the affidavit of James S. Y. Ivins, sworn to on the 15th day of March, 1937, and the exhibit thereto annexed, and the supplemental affidavit of J. M. Richardson Lyeth, sworn to the 22nd day of March, 1937, and Exhibits "A" and "B" thereto annexed, in support of said motion; and the affidavit of George B. Schoonmaker, sworn to the 23rd day of March, 1937, and Exhibits "A" and "B" thereto annexed and the supplemental affidavit of George B. Schoonmaker, sworn to the 30th day of March, 1937, in opposition thereto; and the said motion coming on to be heard before Hon. Alfred C. Coxe, Judge of the District Court of the United States for the Southern District of New York, at a Stated Term thereof for motions, held at the United States Court House, Foley Square, Borough of Manhattan, City of New York, on the 23rd day of March, 1937, and after hearing J. M. Richardson Lyeth, of counsel for Carter, Ledyard & Milburn, attorneys for the plaintiff, in support of said motion, and George B. Schoonmaker, of counsel for Lamar Hardy, United States Attorney for the Southern District of New York, attorney for the defendant, in opposition to the said motion; and due deliberation having been had thereon and upon filing the opinion of the Court, it is

Ordered that the plaintiff's motion for summary judgment under Rule 113, New York Rules of Civil Practice, be and the same hereby is granted, that the defendant's amended answer and original answer are hereby stricken out, and [fol. 190] that judgment is directed for the plaintiff for $65,905.68 and interest thereon from October 16, 1936, as demanded in the complaint, together with the costs of this action.

Alfred C. Coxe, U. S. D. J.

IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGMENT—August 3, 1937

The plaintiff having moved this Court for summary judgment in this action pursuant to Rule 113 of the New York Rules of Civil Practice; and said motion having regularly come on to be heard on March 23rd, 1937; and said motion having been duly granted by an order made by Hon. Alfred C. Coxe, United States District Judge, dated July 29, 1937, filed in the office of the Clerk of this Court on July 29, 1937, wherein it was provided that the plaintiff's motion for summary judgment be granted and judgment was directed for the plaintiff in the sum of $65,005.68 and interest thereon [fol. 191] from October 16, 1936; and plaintiff's costs having been duly taxed at $21.50,

Now, on motion of Carter, Ledyard & Milburn, attorneys for the plaintiff, it is

Adjudged that the plaintiff, Munro L. Lyeth, of 4663 Waldo Avenue, New York City, recover of the defendant, James J. Hoey, Collector of Internal Revenue of the United States for the Second District of New York, the sum of $65,005.68, with interest according to law, together with his costs as taxed in the sum of $21.50.

Judgment dated this 3rd day of August, 1937.

Charles Weiser, Clerk.

[fol. 192] IN UNITED STATES DISTRICT COURT

[Title omitted]

CERTIFICATE OF PROBABLE CAUSE—December 16, 1937

This action for the recovery of Federal income taxes paid to the defendant by the plaintiff having been commenced by personal service of the summons and complaint upon the defendant, and the defendant having appeared herein by the United States Attorney for the Southern District of New York, his attorney, and a judgment having been entered herein on the 3rd day of August, 1937 in favor of the plaintiff and against the defendant for the sum of $65,005.68 with

interest according to law, together with costs taxed in the sum of $21.50,

Now, therefore, pursuant to Section 969 of the Revised Statutes of the United States, 28 U. S. C. 842, I hereby certify that the defendant, James J. Hoey, Collector of Internal Revenue of the United States for the Second District of New York, in doing the acts on which the said judgment is based, acted under the directions of the proper officer [fol. 193] of the Government and had probable cause for doing the said acts.

Dated New York, N. Y., December 16, 1937.

Wm. Bondy, U. S. D. J.

Entry of the foregoing certificate is hereby consented to without further notice.

Carter, Ledyard & Milburn, Attorneys for Plaintiff.

In United States District Court

[Title omitted]

Petition for and Allowance of Appeal—October 27, 1937

Now comes the defendant, James J. Hoey, designated as Collector of Internal Revenue of the United States for the Second District of the State of New York, and says that on [fol. 194] the 29th day of July, 1937, the Court entered an order herein granting the plaintiff's motion for summary judgment against the defendant, that on the 3rd day of August, 1937, the Court entered judgment in favor of the plaintiff and against the defendant in the sum of $65,005.68, with interest according to law, plus costs of $21.50, and that by the said order and judgment certain errors were committed to the prejudice of the defendant, all of which will more fully appear from the assignment of errors filed with this petition.

Wherefore the defendant prays an appeal from the said order and judgment to the Circuit Court of Appeals for the Second Circuit for the correction of the errors so complained of and for the allowance of the said appeal and for leave to prosecute the same and that a transcript of record

of the proceedings and papers in this cause, duly authenticated, be forwarded to the said Circuit Court of Appeals.

Dated New York, N. Y., October 27, 1937.

Lamar Hardy, United States Attorney for the Southern District of New York, Attorney for the Defendant.

The above appeal is hereby allowed.

Dated New York, N. Y., October 27, 1937.

J. W. C., U. S. D. J.

[fol. 195] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—October 27, 1937

Now comes the defendant, James J. Hoey, designated as Collector of Internal Revenue of the United States for the Second District of the State of New York, and says that in the record and proceedings in the above entitled cause there is manifest error which occurred in the proceedings had therein upon which he will rely in the prosecution of his appeal herein in the following:

1. The Court erred in granting the plaintiff's motion for summary judgment.

2. The Court erred in entering the order granting the plaintiff's motion for summary judgment.

3. The Court erred in entering the judgment against the defendant.

4. The Court erred in holding that the plaintiff was entitled to recover any sum from the defendant.

5. The Court erred in holding that the plaintiff had overpaid his income taxes for the year 1933.

[fol. 196] 6. The Court erred in holding that what the executors of the will of Mary B. Longyear turned over in 1933 to Longyear Heirs, Inc., as assignee of the plaintiff was part of the residuary estate of the said Mary B. Longyear.

7. The Court erred in holding that the additional assessment made by the Commissioner of Internal Revenue against

the plaintiff for the year 1933 in the amount of $56,389.65 was erroneous.

8. The Court erred in holding that the plaintiff in contesting the probate of the will of Mary B. Longyear was seeking to enforce rights which had come to him by inheritance from her.

9. The Court erred in holding that the property which the plaintiff or his assignee received in 1933 from the executors of the will of Mary B. Longyear was not received by purchase for the purpose of determining whether the property was income within the meaning of the federal income tax laws.

10. The Court erred in holding that property received by a person is not income to that person within the meaning of the federal income tax laws unless it is gain derived from capital or labor or from both combined or unless it is profit gained through a sale or conversion of capital assets.

11. The Court erred in holding that the property received by the plaintiff in 1933 from the executors of the will of Mary B. Longyear was not income within the definition of income in Eisner v. Macomber, 252 U. S. 189.

[fol. 197] 12. The Court erred in holding that the will contest conducted by the plaintiff was not productive of income to the plaintiff.

13. The Court erred in holding that no gain resulted to the plaintiff when he relinquished his right to object to the probate of the will of Mary B. Longyear and received in exchange in 1933 the property on which the Commissioner of Internal Revenue placed a value of $141,484.03.

14. The Court erred in holding that this property which the plaintiff received pursuant to the settlement of the will contest constituted capital and not income.

15. The Court erred in holding that what a person receives in the nature of a windfall is not income within the meaning of the federal income tax laws.

16. The Court erred in holding that the circumstances surrounding the transfer of the property which the plaintiff received in 1933 did not give rise to an equitable recoupment against the plaintiff.

17. The Court erred in holding that there was no basis for a set-off or counterclaim by the defendant.

18. The Court erred in holding that the plaintiff was entitled to recover anything, since at the time when the plaintiff paid the $65,005.68 on October 16, 1936, the liability of the plaintiff, as transferee of assets of the estate amounting to $141,484.03, for estate taxes then owing and unpaid in a sum greater than $65,005.68, still existed.

[fol. 198] 19. The Court erred in holding that the plaintiff was entitled to recover anything since at the time assets of the estate in the amount of $141,484.03 were transferred to the plaintiff on July 26, 1933, they were subject to a lien for the amount of the unpaid estate taxes.

20. The Court erred in holding that the plaintiff was entitled to recover anything since on October 16, 1936, when the plaintiff paid the $65,005.68 he had not overpaid his tax account for that year.

21. The Court erred in holding that an assessment against the plaintiff as a transferee was a prerequisite to the enforcement of the plaintiff's liability by way of recoupment.

22. The Court erred in holding that the plaintiff was not estopped to assert that the property which he received in 1933 from the executors of the estate of Mary B. Longyear was not income.

Wherefore, the defendant prays that the said order granting the plaintiff's motion for summary judgment and the said judgment against the defendant be reversed and held for naught and that the defendant be restored to all things which he has lost by reason of the said order and judgment.

Dated, New York, N. Y., October 27, 1937.

Lamar Hardy, United States Attorney for the Southern District of New York, Attorney for the Defendant.

[fol. 199] Citation, in usual form, omitted in printing.

[fol. 200] In United States District Court

[Title omitted]

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the District Court for the Southern District of New York in the above entitled matter as agreed on by the parties.

Dated, New York, N. Y., December 28, 1937.

Carter, Ledyard & Milburn, Attorneys for Plaintiff.
Lamar Hardy, United States Attorney, Attorney for Defendant.

[fol. 201] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 202] In United States Circuit Court of Appeals

[Title omitted]

Opinion—April 11, 1938

Appeal from an order of the District Court for the Southern District of New York granting a motion for summary judgment for the plaintiff in a suit for the recovery of income taxes paid.

Carter, Ledyard & Milburn, of New York City (J. M. Richardson Lyeth and Allin H. Pierce, both of New York City, of counsel), for plaintiff-appellee.

Lamar Hardy, U. S. Atty., of New York City (George B. Schoonmaker, of New York City, of counsel), for the defendant-appellant.

Chase, Circuit Judge:

The plaintiff is a grandson of Mary Beecher Longyear, late of Brookline, Mass., who died on March 14, 1931. She disposed of all her property by a will which was duly presented for probate. Its allowance was, however, contested by her heirs who in accordance with the applicable law of Massachusetts moved in the probate court that jury issues

be framed in order that the validity of the will might be determined by trial by jury. The motion was granted.

Under the provisions of the will, the heirs would have received only a comparatively small portion of the estate of Mrs. Longyear. The major part of her property, making up her residuary estate, had been left to trustees under a charitable trust she had created. But before the will contest was tried all the parties in interest entered into a settlement agreement providing for the allowance of the will and the distribution of the estate in accordance with the will and the agreement of settlement. This settlement of the will contest was approved by the probate court in a decree which allowed the will; provided for the issuance of letters testamentary to the executors named therein; and directed them "to administer the estate of said deceased in accordance with the terms of said will and said agreement of compromise."

The executors performed their duties as directed and as a result of the compromise thus carried out, the appellee received on July 26, 1933, property, determined by the Commissioner to be worth $141,484.03, which he did not include in his gross income for that year and which he would not have received under the terms of the will had that been allowed as presented for probate originally. The value of the property so received was disputed but that is of no moment on this appeal, nor will it be helpful to recite the various steps taken to carry out the compromise and turn the property over to the appellee. Because of its receipt, he was assessed, and he paid on October 16, 1936, additional income taxes for 1933 which with interest [fol. 203] amounted to $65,005.68. A claim for refund was duly filed and disallowed in full. Thereafter this suit was timely brought to recover the taxes and interest thus paid. On motion of the plaintiff a summary judgment for him for the amount paid with interest was entered and from that this appeal was taken.

The taxes which the plaintiff is seeking to recover were assessed and paid on what was treated as income under the provisions of section 22 of the Revenue Act of 1932, 47 Stat. 169, 178, 26 U. S. C. A. § 22 and note, which in subdivision (a), 26 U. S. C. A. § 22(a) and note, defines "gross income" as including "gains, profits, and income derived from salaries, wages, or compensation for personal

service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever." The basis of the plaintiff's present action is that what was taxed as income was not income within the meaning of the statute and of the sixteenth amendment. The defendant, and the defendant actually though not in form is the United States, denied that what was taxed was anything but income and as an affirmative defense alleged that in the alternative the plaintiff was liable as a distributee for estate taxes unpaid which should be set off against his present demand.

In deciding whether or not what the plaintiff received as a result of the compromise of the contest of his grandmother's will should have been included in his gross income for that year, it must not be forgotten that the statutory definition of gross income includes gains and profits growing out of an interest in property and gains and profits derived from any source whatever. The statute couples the word "income" with gains and profits but we put nothing upon that for obviously gross income does include income and the solution of the present problem is not advanced by merely saying so. But to the extent that what was received was a gain growing out of an interest in property or was a gain derived from any source whatever it did fall within the broad definition of the statute and became a part of the plaintiff's gross income for the year received.

As a grandson of the decedent, the plaintiff occupied a status under the laws of Massachusetts which entitled him to inherit a part of her estate provided she died intestate but if she died testate his right to inherit as an heir at law would be extinguished by her will when allowed and he would take, if anything, in accordance with its provisions. This status was his for whatever it might be worth but such rights as it gave to him were but the expectations of an heir at law incapable of being given any cost basis for they in fact cost him nothing. When his grandmother died leaving an instrument which she had executed as her will which purported to dispose of her entire estate, his right to inherit as an heir-at-law was not absolutely extinguished but

that was made contingent upon the probate of her will. He then had, for the time being, merely the right to contest that probate. A successful contest would do away with the will and leave him in the same position as though his grandmother had left none. His right to contest the probate of the will enabled him to participate in the compromise agreement whereby the contest was abandoned in return for the amount agreed upon. This was not the amount he would have received had there been no will and was something he did receive in spite of the will. It was the realization by him of the value of his bargaining position without running the risk of the outcome of the will contest. As what he relinquished in return for what he got had no cost basis, what he did receive, increased whatever he had to the full extent of its value. It grew out of his claim to an interest in the property comprising his grandmother's estate and was a "gain * * * from whatever source derived." This increase of the property of this plaintiff distinguishes his situation from that of the taxpayer who received the stock dividend in Eisner v. Macomber, 252 U. S. 189, 40 S. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570, and got but new evidence of a capital interest he had before. Nor was it received in satisfaction of any duty to support the plaintiff as was the alimony in Gould v. Gould, 245 U. S. 151, 38 S. Ct. 53, 62 L. Ed. 211. Nor can it be treated in any sense as a reimbursement for capital expenditures as in Edwards [fol. 204] v. Cuba Railroad Co., 268 U. S. 628, 45 S. Ct. 614, 69 L. Ed. 1124. The translation by this taxpayer of his right to contest the will into property capable of being given a definite money value resulting as it did from his compromise of his claim of right to share in his grandmother's estate was essentially like the receipt by the taxpayer in Sterling v. Commissioner of Internal Revenue, 2 Cir., 93 F. 2d 304, of the money in satisfaction of her claim to an interest in the real estate there involved. As neither claim had any cost basis, it is of no consequence that the instant claim was apparently better founded in fact and law than the one in the case just mentioned. In so far as Central R. Co. v. Commissioner, 3 Cir., 79 F. 2d 697, 101 A. L. R. 1448, may be thought contrary to our position herein we adhere to what was said about it in Sterling v. Commissioner, supra. Accordingly, we conclude that what this taxpayer received falls within the broad definition of gross income above quoted (see Bernard O. Kearney v.

Commissioner, 31 B. T. A. 935), unless it is excluded elsewhere in the statute.

In section 22 (b) (3) of the 1934 Act, 26 U. S. C. A. § 22 (b) (3), it is provided that the value of property acquired by gift, bequest, devise, or inheritance shall not be included in gross income and the plaintiff insists that this property was in fact, if not strictly in form, acquired by inheritance. He is supported in this position by Magruder v. Sagebade, 4 Cir., 94 F. 2d 177, which expressly followed the decision of the district court in the instant case. With due deference, we are unable to reach the same conclusion and especially not in this instance because of the effect of the law of Massachusetts.

It is quite true that what constitutes federal taxable income is not controlled by state law. Blair v. Commissioner, 300 U. S. 5, 57 S. Ct. 330, 81 L. Ed. 465. But whether this property was received by way of inheritance or otherwise does depend upon the law of the jurisdiction under which this taxpayer received it. Uterhart v. United States, 240 U. S. 598, 36 S. Ct. 417, 60 L. Ed. 819; Sutherland v. Selling, 9 Cir. 16 F. 2d 865. The procedure which was followed in reaching the compromise of the will contest was one well known in Massachusetts, one, indeed expressly authorized by statute, St. 1964, c. 178; and the nature of the receipt of the fruits of such a contest by a contestant through a compromise under which the will is allowed and the estate distributed in accordance with an approved compromise agreement is well settled by the decisions of the Supreme Court of that commonwealth. The taking is by purchase from those who get title under the allowed will and in effect transfer to the contestant under the terms of the settlement contract although the form may take that of direct distribution to the contestant by the executor. What does happen in legal effect was well stated, in Ellis v. Hunt, 228 Mass. 39, 116 N. E. 956, in these words: "The agreement for compromise, even when approved by decree of the court, is not in any accurate sense a modification of the will. The will as an entirety and in all its parts is established and admitted to probate. The court does not undertake to admit to probate a part of the will and to refuse to allow another part. But the agreement whereby the heirs at law on the one side and the devisees and legatees on the other have modified their rights under the will, is made matter of public record, its validity is approved by the court, and the duty of carrying

out its terms is placed on those executing the will. The agreement is not incorporated into the will. The will stands by itself. Although the practice is to insert a clause in the decree of the court to the effect that the estate is to be administered in accordance with the agreement, yet the rights of the parties so far as they rest upon the agreement are contractual and not testamentary." To the same effect are Brandeis v. Atkins, 204 Mass. 471, 90 N. E. 861, 26 L. R. A., N. S., 230; Baxter v. Treasurer & Receiver General, 209 Mass. 459, 95 N. E. 854; and Brown v. McLoughlin, 287 Mass. 15, 190 N. E. 795.

Thus it seems clear that what the plaintiff received and on which he paid an income tax was actually includable in his gross income for the year of its receipt. Because this fully determines the rights of the parties on this appeal we find it unnecessary to discuss the affirmative defense above mentioned.

Judgment reversed.

Augustus N. Hand, Circuit Judge, concurs in separate opinion.

[fol. 205] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1937

Argued Feb. 11, 1938. Decided April 11, 1938

No. 211

MUNRO L. LYETH, Plaintiff-Appellee,

v.

JAMES J. HOEY, Collector of Internal Revenue of the United States for the Second District, State of New York, Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

Before, Manton, Augustus N. Hand, and Chase, Circuit Judges

AUGUSTUS N. HAND, Circuit Judge (concurring):

I concur in the opinion of Judge Chase for the reason that there was no proof that the sum received by the tax-

payer in settlement of the will contest was not wholly gain over the value of any right which passed to him on the death of the testatrix. On the record before us it is quite impossible to say whether the bequest for the benefit of the Longyear Foundation was reduced under the agreement because of the legal strength of the contestant's position or because of avoidance by the Foundation of the expense and annoyance of litigation, or of its belief that to retain so large a portion of the estate against the protest of the relatives as would pass to it under the literal terms of the will would be unwise as a matter of policy. That many considerations other than the weighing of strict legal rights dictate the settlement of will contests is notorious. If it had been, or could have been shown what the rights of the next of kin to contest the will were worth, I am inclined to think that no taxable gain could have been assessed unless the $141,484.03 proved to be greater than that worth. It was for the reason that the rights of the taxpayer derived under the will in Sterling v. Commissioner, 2 Cir., 93 F. 2d 304, were shown to be worth nothing because they had no legal validity that we held the entire amount received by her from the proceeds of sale represented a taxable gain. But there may be situations where the value of a right to contest a testamentary disposition can be established. If so, that value should furnish a base for determining whether an amount received in settlement can fairly be found to involve a gain. One example of such a situation would be where a devise clearly violated the rule against perpetuities or against the suspension of alienation. There property would pass by inheritance and other testamentary dispositions in the will would remain effective although the invalid devise was in form a testamentary gift. It would seem that if the heir settled his claims for less than his full right of inheritance and allowed the balance of the property covered by the invalid devise to pass to the person described in the will, he would in fact be receiving an inheritance, even though the mode of acquiring the portion of the estate which would pass to him would be through the mechanism of an agreement of settlement. In such a case I think he ought not to be chargeable with any taxable gain.

Where a probate court directs a transfer of a decedent's property to a person not entitled to it under a will, but who would be entitled to inherit it if there were no will, I incline to the view that the right to contest the will is of the nature

of an inheritance excluded from gross income under section 22 (b) (3) of the Revenue Act of 1932, 26 U. S. C. A. § 22 [fol. 206] (b) (3) and note, and that the amount received in exchange for his right represents a taxable gain only to the extent that it exceeds the value of the right to contest. I think, in other words, that taxation must in every case depend upon the particular facts and not upon a general rule that wherever an heir at law settles a will contest everything he may receive under the settlement represents a gain to be included in his income for taxation purposes. The difficulty in the present case is in determining the basis for computing the gain and of showing the value of the taxpayer's right to contest and that the payment of $141,484.03 to him was not wholly gain. It is because of the failure of the taxpayer to meet the burden of establishing whether his inherited right had any value and, if so, what value it had, that he must fail. We cannot say that the amount paid in settlement was not greater than the value of the right to contest the will or that the assessment of the Commissioner was unfounded.

[fol. 207] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 18th day of April, one thousand nine hundred and thirty-eight.

Present: Hon. Martin T. Manton, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

MUNRO L. LYETH, Plaintiff-Appellee,

vs.

JAMES J. HOEY, Collector, etc., Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

JUDGMENT—Filed April 18, 1938

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed with costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 208] [File endorsement omitted.]

[fol. 209] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 210] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed May 31, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
MAY 18 1938
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937—No. 48

MUNRO L. LYETH,

Petitioner,

v.

JAMES J. HOEY, Collector of Internal Revenue of the United States for the Second District of the State of New York.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

J. M. RICHARDSON LYETH,
WILL R. GREGG,
ALLIN H. PIERCE,
Counsel for Petitioner.

Tuttle Courier Press, N. Y. C.

INDEX.

	PAGE
Petition for Writ of Certiorari	1
Statement	1
The Facts	2
Questions Involved	3
Reasons for Granting Writ	4
Brief in Support of Petition for Writ of Certiorari	7
Opinions Below	7
Jurisdiction	7
Statement of Facts	7
Specification of Errors to be Urged	7
Argument	9
I—The decision below is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Magruder* v. *Segebade*	9
II—Many important cases are pending in the Bureau of Internal Revenue, the Board of Tax Appeals and the Courts involving the question decided in this case and in *Magruder* v. *Segebade*	11
III—The decision below will impose income tax liability upon parties to every compromise of a disputed claim of a capital nature	12
Conclusion	13
Appendix A	15

TABLE OF CASES CITED:

PAGE

Magruder v. *Segebade*, 94 Fed. (2d) 177 (C. C. A. 4, affirming D. C. Md.) 4, 9, 10, 11

Smith v. *Patterson*, 286 Mass. 356 (1934) 2

OTHER AUTHORITIES CITED:

Revenue Act of 1932, Section 22(b)(3) 4, 8, 10

Judicial Code, Section 240(a) 7

Constitution of United States, Sixteenth Amendment .. 8, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937—No.

MUNRO L. LYETH,

Petitioner

v.

JAMES J. HOEY, Collector of Internal Revenue of the United States for the Second District of the State of New York.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Munro L. Lyeth, respectfully shows to the Court as follows:

STATEMENT

This is a petition for a writ of certiorari to review a decision of the United States Circuit Court of Appeals for the Second Circuit reversing a judgment entered in the District Court for the Southern District of New York against the Collector for $65,005.68 with interest and costs. A written opinion (R. 203-209) and a concurring opinion by Judge Augustus N. Hand (R. 210-212) were handed down and the order for mandate was filed on April 18, 1938 (R. 213).

Petitioner sued to recover additional income taxes for the year 1933 paid pursuant to an additional assessment based upon the receipt by him from the executors of his grandmother's estate of certain property pursuant to an agreement compromising objections to the probate of the will. The Collector filed an answer and petitioner moved for summary judgment under Rule 113 of the New York Rules of Civil Practice upon the pleadings and upon affidavits. Judge Coxe made an order granting the motion (R. 188-190) and judgment for the petitioner was entered thereon (R. 190-191). The Circuit Court of Appeals reversed the judgment (R. 213).

The Facts

The facts are not in dispute.

Petitioner's grandmother, Mary B. Longyear, died a resident of Massachusetts leaving an estate initially inventoried at more than $3,000,000. By her will the decedent bequeathed to her four surviving children and the petitioner and his brother, children of a deceased daughter, comparatively trifling legacies, and she bequeathed to an alleged charitable trust the entire residue (R. 90, 91).

The heirs objected to the probate of the will upon the grounds of lack of testamentary capacity and undue influence. The heirs moved for an order framing jury issues (R. 92). Under Massachusetts law a probate judge in granting such a motion must find that there was a "genuine question of fact supported by evidence of such substantial nature as to afford ground for reasonable expectation of a result favorable to the party requesting the framing of issues." *Smith* v. *Patterson,* 286 Mass. 356 (1934) (R. 93). After hearing offers of proof from counsel for pro-

ponents of the will and counsel for the heirs, the Probate Judge entered an order framing jury issues (R. 92).

Thereafter a compromise agreement was entered into which provided in substance that the specific and pecuniary bequests to individuals be enforced, but that the residuary bequest to the alleged charitable trust be disregarded and the net residue of the estate be divided one half to the said charitable trust and one half to the heirs. The compromise agreement was approved by the Massachusetts Probate Court pursuant to a Massachusetts statute and a decree was entered admitting the will to probate, issuing letters testamentary to the executors named therein, and directing said executors to "administer the estate of said deceased in accordance with the terms of said will and said agreement of compromise" (R. 96, 97, 62, 63, 24-50).

The executors, pursuant to said order, transferred to an assignee of the petitioner a certificate of deposit representing shares of corporations owned by the decedent prior to her death (R. 98). The Commissioner valued this distributable share of the petitioner at $141,484.63 and treated the whole amount as taxable income for the year in which it was received (R. 12-15). Petitioner paid the amount of the deficiency assessed thereon and brought this suit against the Collector to recover the amount paid.

Questions Involved

The questions presented in this case are:

(1) Is a distribution from a decedent's estate made to an heir by the executors pursuant to an order of the Probate Court, following the compromise of a will contest in that court, income under the Sixteenth Amendment of the Constitution of the United States?

(2) If such a distribution made in the year 1933 is income, is it exempt from taxation under Section 22 (b) (3) of the Revenue Act of 1932 which exempts "The value of property acquired by gift, bequest, devise, or inheritance * * *"?

(3) If a compromise of litigation is regarded as a sale or exchange of property, must the taxpayer, in order to establish his basis for determining gain or loss, prove the value of his chance of success by producing the evidence he would have introduced at the trial of the litigation compromised?

(4) Are the federal courts controlled by the shifting theories of local laws applied in state inheritance tax cases, regarding the manner of transmission of a decedent's property where the ownership of the property is not in dispute?

Reasons for Granting Writ

(1) The decision below is in conflict with the decision of the United States Circuit Court of Appeals for the Fourth Circuit in *Magruder* v. *Segebade*, 94 Fed. (2d) 177 (January 4, 1938) in which that Court expressly approved and followed the decision of District Judge Coxe herein. The Solicitor General decided not to apply for a writ of certiorari in said *Magruder* v. *Segebade* and the time within which to make such application has expired.

(2) The Court below has decided that a claim which if successfully prosecuted to judgment would not be productive of taxable income, produces taxable income if it is compromised. A considerable number of cases are pending in the Bureau of Internal Revenue, the Board of Tax Appeals and the Courts, involving this question and several are being held in abeyance awaiting final decision in this case. A list of the pending cases is contained in Appendix A.

(3) The decision below is of far-reaching importance in that it will affect the income tax liability of parties to every compromise of a disputed claim of a capital nature.

WHEREFORE your petitioner respectfully prays that a writ of certiorari may issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court on a day designated for its review and determination a full and complete transcript of the record and full proceedings in said Circuit Court of Appeals had in the case numbered 211 and entitled "*Munro L. Lyeth,* Plaintiff-Appellee, v. *James J. Hoey,* Collector of Internal Revenue for the United States for the Second District of the State of New York, Defendant-Appellant"; to the end that said cause may be reviewed and determined by this Court as provided by law, that the determination of the United States Circuit Court of Appeals for the Second Circuit herein may be reversed, and that your petitioner may have such other and further relief as may be just.

MUNRO L. LYETH,
By: J. M. RICHARDSON LYETH,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the Circuit Court of Appeals for the Second Circuit by Circuit Judge Chase (R. 203-209) and the concurring opinion by Circuit Judge Augustus N. Hand (R. 210-212) are reported in Commerce Clearing House, 1938 Federal Tax Service, Volume 4, Section 9255. The opinion of District Judge Alfred C. Coxe (R. 179-187) is reported in 20 Fed. Supp. 619.

Jurisdiction

The order for mandate of the Circuit Court of Appeals was filed April 18, 1938 (R. 213). Jurisdiction is conferred upon this Court by Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Statement of Facts

The statement of facts and questions presented appear in the petition for certiorari.

Specification of Errors to be Urged

The Circuit Court of Appeals erred:

(1) In holding that the property received by the petitioner from the executors of his grandmother's

estate was taxable income under the Sixteenth Amendment of the Constitution of the United States.

(2) In holding that such property was not exempt from taxation under Section 22(b)(3) of the Revenue Act of 1932 which exempts "The value of property acquired by gift, bequest, devise, or inheritance * * *".

(3) In holding that the compromise of the pending litigation constituted a sale or exchange of property.

(4) In holding that the compromise of the pending litigation, which if successfully prosecuted to judgment would not have been productive of income, rendered property received under that compromise taxable as income.

(5) In holding that the right to participate as an heir in the entire decedent's estate, which the petitioner gave up under the compromise agreement, was not acquired by inheritance.

(6) In holding that the right to participate as an heir in the entire decedent's estate, which the petitioner gave up under the compromise agreement, had no cost basis to the petitioner.

(7) In holding that the determination of the Federal courts, as to whether the property received by the petitioner was "acquired by * * * inheritance" within the meaning of the exemption provision of the applicable revenue act, is controlled by decisions of the Massachusetts state courts construing the state inheritance tax act.

Argument

I

The decision below is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Magruder* v. *Segebade*.

In *Magruder* v. *Segebade*, 94 Fed. (2d) 177 (C. C. A. 4, affirming D. C. Md.), the taxpayers were heirs at law or next of kin of the testator who had executed two wills, one dated in 1926 and the one offered for probate dated in 1933. The taxpayers filed a notice of caveat before the last will was submitted for probate. No caveat was filed, but before the last will was admitted to probate a compromise agreement was entered into between the taxpayers and the other legatees under the last will whereby the other legatees paid to the taxpayers the sum of $245,000 and the taxpayers agreed that their objections to the probate of the last will would be withdrawn, the last will would be admitted to probate and the estate would be distributed in accordance therewith. The Circuit Court of Appeals for the Fourth Circuit, affirming the decision of the District Court, decided that the amounts received by the taxpayers were not taxable income under the statute or under the Sixteenth Amendment of the Constitution.

In the present case the facts are substantially identical except that under the compromise agreement the heirs, including the petitioner, received part of the decedent's property in kind from the executors, pursuant to an order of the Probate Court, and not a cash payment from the residuary legatees. This distinction in the facts emphasizes the conflict between

the decisions because there is much stronger ground for holding in the present case that the property was received by way of inheritance.

The opinions of the two Circuit Courts of Appeals conflict on all of the basic questions involved:

(1) The Fourth Circuit held that the receipts of the taxpayers under the compromise of the will contest were not income within the meaning of the Sixteenth Amendment. The Second Circuit held they were income.

(2) The Fourth Circuit indicated that said receipts would be exempt from tax under the exemption granted by Section 22 (b) (3) of the applicable Revenue Act. The Second Circuit held they were not exempt.

(3) The Fourth Circuit refused to hold that the compromise was a sale or exchange within the meaning of the taxing statute. The Second Circuit held that the compromise was a sale or exchange.

(4) The Fourth Circuit held that the results of a compromise of rights, the proceeds of which are not taxable, do not become taxable because the compromise was brought about by an agreement not to litigate. The Second Circuit held that the results of the compromise were taxable.

The irreconcilable conflict between the two courts is shown in the following quotations from their opinions:

Magruder v. *Segebade* (C. C. A. 4):

> "The precise question involved here was considered in the case of *Lyeth* v. *Hoey*, 20 Fed. Supp. 619, where the amount received by the compromise of a contested will was involved. Judge Coxe, in a well considered opinion, reached

the same conclusion as was reached here by the court below" (p. 178).

Lyeth v. *Hoey* (C. C. A. 2):

> "He (the plaintiff) is supported in this position by *Magruder* v. *Segebade*, 94 Fed. (2) 177 (C. C. A. 4) which expressly followed the decision of the district court in the instant case. With due deference, we are unable to reach the same conclusion * * *" (R. 208).

II

Many important cases are pending in the Bureau of Internal Revenue, the Board of Tax Appeals and the Courts involving the question decided in this case and in *Magruder* v. *Segebade*.

The decision of the court below establishes the principle that a claim which if successfully prosecuted to judgment would not be productive of taxable income, produces taxable income if it is compromised. Petitioner's counsel have received letters from attorneys for taxpayers in many cases involving this question, which are pending in the Bureau of Internal Revenue, the Board of Tax Appeals and the courts. A list of such cases is set forth in Appendix A. Many of these cases are being held in abeyance awaiting decision in this case.

There are six other cases involving income tax deficiencies against the other heirs of Mary B. Longyear. The total deficiencies against the heirs, including the petitioner, approximate $675,000, excluding interest. A list of these cases is also included in Appendix A.

III

The decision below will impose income tax liability upon parties to every compromise of a disputed claim of a capital nature.

The effect of the decision below is not limited to compromises of will contests. Compromises of claims to recover income will not be affected because the avails would be taxable whether the claim were prosecuted to judgment or compromised. However, every compromise of a claim of a capital nature will come within the purview of the decision, including claims for death or personal injuries, damage to property, defamation of character, seduction, alimony, and all claims which if successfully prosecuted to judgment would not produce taxable income. Few litigants of such claims will dare to compromise because of the hazard of incurring huge income taxes. Thus, if the decision below is not reversed, the well-established public policy of the courts to encourage compromises and reduce litigation will largely disappear.

Judge A. N. Hand, in the concurring opinion below held that petitioner acquired the right to contest the will by inheritance, but that he failed to establish that his chance of success was worth the amount received upon the compromise (R. 211). Judge Hand said:

> "That many considerations other than the weighing of strict legal rights dictate the settlement of will contests is notorious. If it had been, or could have been shown what the rights of the next of kin to contest the will were worth, I am inclined to think that no taxable gain could have been assessed unless the $141,484.03 proved to be greater than that worth."

It seems apparent that to satisfy Judge Hand's requirement the petitioner must introduce evidence of his grandmother's lack of testamentary capacity and undue influence and try the will contest in this law suit. If this theory is sound, litigants who compromise law suits in the expectation of saving the time and expense of litigation will be disappointed because they may have to try out the merits of the controversy with the Commissioner of Internal Revenue in an income tax case, in order to establish that their chance of success was at least as valuable as the amount received under the compromise.

The far-reaching effect of the decision in this case will be to impose a probable income tax liability upon parties to every compromise of a disputed claim of a capital nature. It will compel the litigation which the compromise was intended to avoid.

Conclusion.

In order that the conflict of the decision below with the decision of the Circuit Court of Appeals for the Fourth Circuit may be resolved and in order that the important question involved in the administration of the tax laws may be settled by this Court, it is submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

J. M. Richardson Lyeth,
Will R. Gregg,
Allin H. Pierce,
Counsel for Petitioner.

May, 1938.

Appendix A.

Pending Cases Involving the Question Decided in Lyeth v. Hoey

The following are the cases involving deficiencies in income taxes of the other heirs of Mary B. Longyear:

Case	Pending	Approximate Amount of Tax
John M. Longyear, Jr.	B.T.A. No. 87033	$142,649.54
Abby B. Roberts	B.T.A. No. 87000	141,755.40
Helen L. Paul	B.T.A. No. 86999	139,603.52
Robert D. Longyear (1933)	B.T.A. No. 87003	137,793.34
(1932)	U. S. District Court, Massachusetts	57.28
J. M. Richardson Lyeth, Jr.	Tax paid and claim for refund disallowed. Suit must be started before November, 1938, probably in Court of Claims	56,411.50

The following are other pending cases involving the question whether a claim which if successfully prosecuted to judgment would not be productive of taxable income, produces taxable income if it is compromised:

Case	Pending	Approximate Amount of Tax
Inez Renfro Allen	B.T.A. No. 92579	$107,260.70
Beatrice Andrews and others	Bureau of Internal Revenue	23,811.35
Albert J. Hall & Estate of Ada A. Hall	B.T.A. No. 92993	122,309.83
Fannie May Herrscher	B.T.A. No. 89452	121,209.25
Charlotte Keller	B.T.A. No. 93026	100,452.61
Grace B. Macquarrie	B.T.A. No. 85102	283,560.00
Rosa Dew Stansbury	B.T.A. No. 85103	283,810.79

Case	Pending	Approximate Amount of Tax
Stuart J. Rackham	B.T.A. No. 92772	50,176.66
Harry G. Rackham	B.T.A. No. 92773	59,396.21
Avery M. Rackham	B.T.A. No. 92774	59,196.88
Helen R. Clark	B.T.A. No. 93023	52,111.25
Leicester Schutte	Bureau of Internal Revenue	878.07
	New York State Tax Commission—claim for refund of income tax denied	701.80
Alexandra Gardiner Creel	Bureau of Internal Revenue	124,133.00
Robert David L. Gardiner	Bureau of Internal Revenue	upwards of 100,000.00

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 48.

MUNRO L. LYETH,

Petitioner,

v.

JAMES J. HOEY, Collector of Internal Revenue of the United States for the Second District of the State of New York,

Respondent.

BRIEF FOR PETITIONER.

J. M. RICHARDSON LYETH,
WILL R. GREGG,
ALLIN H. PIERCE,
Counsel for Petitioner.

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INDEX.

	PAGE
Opinions Below	1
Jurisdiction	1
Statement	2
Questions	5
Specification of Errors to be Urged	6
Summary of Argument	7
Argument:	
POINT I—The property received by the petitioner was exempt from income taxation by Section 22(b) (3) of the Revenue Act of 1932 which excludes from gross income "the value of property acquired by gift, bequest, devise, or inheritance"	10
POINT II—The rule of the Massachusetts State Courts that the Massachusetts inheritance tax shall be levied upon the estate created by the will, unaffected by the compromise agreement, has no bearing on the question whether the property received by the petitioner was within the exemption of Section 22(b) (3) of the Revenue Act of 1932	11
POINT III—The determination whether property received is income depends, not on whether it was received pursuant to a compromise agreement, but on whether the rights compromised were of a sort to produce income	19
POINT IV—The property received by the petitioner from the executors was not income under the applicable Revenue Act or under the Sixteenth Amendment of the Federal Constitution	23
A. Petitioner derived no gain from his capital, from his labor, or from both combined	23

PAGE

B. A compromise is not a sale, conversion, or exchange of capital assets which can be productive of taxable income 24

C. Even if the compromise agreement be regarded as a sale, conversion or exchange of assets, petitioner realized no profit therefrom 29

POINT V—The first affirmative defense "by way of set-off and recoupment" is insufficient 33

POINT VI—The collector could not by any pleading or proof defeat petitioner's recovery under the so-called equitable doctrine of "set-off and recoupment" 34

LAST POINT 41

Appendix 43

TABLE OF CASES CITED:

Allen v. *Brandeis*, 29 Fed. (2d) 363 (C. C. A. 8, 1928) 26

Arthur v. *Brooks*, 14 Barbour (N. Y.) 533 (1853) 34

Atwood v. *R. I. Hospital Trust Co.*, 275 Fed. 513 (C. C. A. 1, 1921), cert. den. 257 U. S. 661 3

Avery's Estate, 34 Pa. St. 204 (1859) 16

Bankers Pocahontas Coal Co. v. *Burnet*, 287 U. S. 308 (1932) 18

Barber v. *Westcott*, 21 R. I. 355, 43 Atl. 844 (1899) .. 16

Baxter v. *Treasurer*, 209 Mass. 459 (1911) 14, 16, 19, 35

Biddle v. *Commissioner*, 302 U. S. 573 (1938) 17

Bowers v. *Kerbaugh Empire Company*, 271 U. S. 170, 174 (1926) 23

Briggs v. *Weston*, 1936 Mass. Adv. Sheets 1161, 2 N. E. (2d) 466 (1936) 30

Bull v. *United States*, 295 U. S. 247 (1935) 36, 37, 38

Burk-Waggoner Oil Assn. v. *Hopkins*, 269 U. S. 110 (1925) 17, 18

Burnet v. *Harmel*, 287 U. S. 103 (1932) 17, 18

PAGE

Central R. R. of N. J. v. *Commissioner*, 79 Fed. (2d) 697 (C. C. A. 3, 1935) 21

Chicago & N. W. Ry. Co. v. *Commissioner*, 66 F. (2nd) 61 (C. C. A. 7, 1933) 21

Cochran's Exr. v. *Commonwealth*, 241 Ky. 656, 44 S. W. (2d) 603 (1931) 16

Codman v. *Commissioner*, 50 Fed. (2d) 763, C. C. A. 1 (1931) 16

Douglas v. *Willcuts*, 296 U. S. 1, 8 (1935) 21

Eisner v. *Macomber*, 252 U. S. 189, 207 (1920) 23

English Estate v. *Crenshaw*, 120 Tenn. 531, 110 S. W. 210 (1908) 16

Estate of Thorson, 150 Minn. 464, 185 N. W. 508 (1921) 17

Farmers' and Merchants' Bank of Catlettsburg, Ky. v. *Commissioner*, 59 Fed. (2d) 912 (C. C. A. 6, 1932) 20

Foster v. *Commissioner*, 303 U. S. 618 (1938) 18

Goodman v. *Robb*, 41 Hun (N. Y.) 605 (1886) 34

Gould v. *Gould*, 245 U. S. 151 (1917) 21

Hale v. *Helvering*, 85 Fed. (2d) 819 (1936) 26

Helvering v. *Bowers*, 303 U. S. 618 (1938) 18

Helvering v. *Butterworth*, 290 U. S. 365, 370 (No. 77 *Pardee* case—1933) 18, 26

In re Rossi's Estate, 169 Cal. 148, 146 Pac. 430 (1915) 16

In re Wells' Estate, 142 Iowa 255, 120 N. W. 713 (1909) 16

Irwin v. *Gavit*, 268 U. S. 161 (1925) 18

Jane B. Coates, 3 B. T. A. 429 (1926) 21

Kearney v. *Commissioner*, 31 B. T. A. 935 (1934) 19, 20

Lynchburg Trust & Sav. Bank v. *Commonwealth*, 162 Va. 73, 173 S. E. 548 (1934) 16

PAGE

MacKenzie v. *Wright*, 31 Ariz. 272, 252 Pac. 521 (1927) 16
Magruder v. *Segebade*, 94 Fed. (2nd) 177 (1938) 22
Matter of Cook, 187 N. Y. 253 (1907) 16
Matter of Curley, 160 Misc. (N. Y.) 844, 290 N. Y. Supp. 822 (1936) 13
Matter of Mancinelli, 158 Misc. (N. Y.) 605, 286 N. Y. Supp. 122 (1936) 13
Maud H. Bush, 33 B. T. A. 628 (1935) 21
May R. Spencer, 20 B. T. A. 58, 66 (1930) 21
McEachern v. *Rose*, 302 U. S. 56 (1937) 36, 37, 38, 39
Merchants' Loan & Trust Co. v. *Smietanka*, 255 U. S. 509 (1921) 18
Merriman v. *Commissioner*, 55 Fed. (2d) 879 (C. C. A. 1, 1931) 24

Olliffe v. *Wells*, 130 Mass. 221 (1881) 3

People v. *Rice*, 40 Colo. 508, 91 Pac. 33 (1907) 17
Phillips-Jones Corporation v. *Parmely*, 302 U. S. 233 (1937) 39
Princess Lida of Thurn and Taxis, 37 B. T. A. 41 (1938) 21

Reed v. *Home National Bank of Brockton*, 1937 Mass. Adv. Sheets, 639, 640, 8 N. E. (2nd) 601, 602 27

Saleeby v. *Central R. R. of N. J.*, 40 Misc. (N. Y.) 269, 81 N. Y. Supp. 903 (1903) 34
Smith v. *Patterson*, 286 Mass. 356, 190 N. E. 536 (1934) 30
Sterling v. *Commissioner*, 93 Fed. (2nd) 304 (C. C. A. 2, 1937) 32, 33
Stevenson & Co. v. *Vietor*, 182 N. Y. Supp. 88 (1920) . 34
Stone v. *White*, 301 U. S. 532 (1937) 38, 39, 40, 41
Stroker v. *Commissioner*, 55 Fed. (2d) 626 (C. C. A. 4, 1932) 20
Stroock Plush Co. v. *Talcott*, 129 App. Div. (N. Y.) 14, 113 N. Y. Supp. 214 (1908) 34

Taber's Estate, 257 Pa. St. 81, 101 Atl. 471 (1917) ... 16
Taylor v. *Georgia*, 40 Ga. Appl. 295, 149 S. E. 321 (1929) 17

PAGE

United States v. *Bolster*, 26 Fed. (2d) 760 (C. C. A. 1, 1928) 26

Warner v. *Walsh*, 15 Fed. (2d) 367 (C. C. A. 2, 1926) 26

Weiss v. *Weiner*, 279 U. S. 333 (1929) 17

OTHER AUTHORITIES CITED:

Conformity Act (17 Stat. 197) 9, 34

Federal Constitution, Sixteenth Amendment ... 5, 6, 8, 22, 23

G. C. M. 13308, C. B. XIII-2, p. 184 (1934) 21

Judicial Code, Section 240(a), as amended Act of 1925, 43 Stat. 938 1

Massachusetts Compromise Statute, Section 17 32

Massachusetts General Laws 1932, Chapter 204, Sections 13-18 ..... 3, 10, 43

New York Civil Practice Act, Rule 113 2

New York Decedent Estate Law, Section 18 13

Revenue Act:

1926, §§310, 316, 44 Stat. 9, 77, 80 5

1928, Sections 607, 609, 609a, 45 Stat. 791, 874, 875 ..... 9, 35, 36, 38

1932, Section 22 (b) (3), 47 Stat. 169, 178 5, 6, 7, 8, 10, 11, 13, 14, 15, 23

1932, Section 113 (a) (5), 47 Stat. 169, 199 30

Sol Op. 132 I-1 C. B. 92 (1922) 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 48.

MUNRO L. LYETH, *Petitioner,*

v.

JAMES J. HOEY, Collector of Internal Revenue of the United States for the Second District of the State of New York, *Respondent.*

BRIEF FOR PETITIONER.

Opinions Below.

The opinion of the District Court by Judge Alfred C. Coxe (R. 112-117) is reported in 20 Fed. Supp. 619. The opinion of the Circuit Court of Appeals for the Second Circuit by Circuit Judge Chase (R. 124-129) and the concurring opinion by Circuit Judge Augustus N. Hand (R. 129-131) are reported in 96 Fed. (2d) 141.

Jurisdiction.

The order and mandate of the Circuit Court of Appeals was filed April 18, 1938 (R. 131-132). Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938.

Statement.

Petitioner sues to recover additional income taxes for the year 1933 paid pursuant to an additional assessment based upon the receipt by him from the executors of his grandmother's estate of certain property pursuant to an agreement compromising the objections to probate of her will. Petitioner's motion for summary judgment under Rule 113 of the New York Rules of Civil Practice was granted and judgment was entered against the respondent for $65,005.08 with interest and costs. The Circuit Court of Appeals for the Second Circuit reversed.

Petitioner is a grandson of Mary B. Longyear who died March 14, 1931, a resident of Massachusetts, leaving as her heirs four surviving children, and the petitioner and his brother, sons of a deceased daughter (R. 56). The estate was initially inventoried at more than $3,000,000. (R. 56). By her will the decedent bequeathed to each of her said heirs comparatively trifling legacies (R. 56). The entire residue, which was by far the greater part of the estate, was bequeathed to trustees of a so-called Endowment Trust under which the income was payable to another set of trustees under another trust referred to as Longyear Foundation (R. 58). The principal purpose of the latter trust was to preserve the records of the earthly life of Mary Baker Eddy, the founder of the Christian Science religion (R. 59, 70). Both of these trusts were revocable and subject to amendment by Mrs. Longyear by an instrument in writing, not testamentary in character; and in fact they were twice amended by her, once before the execution of the will (although the amendment was not referred to in her will) and once after such execution (R. 58, 59, 68, 73).

The heirs objected to the probate of the will upon the grounds, among others, of lack of testamentary capacity and undue influence. A motion was made on behalf of the heirs to frame jury issues which was granted after a hearing at which counsel for the proponents and counsel for the contestants stated what their proofs would be (R. 57). If there had been no compromise and the will had been probated after a trial of the contest, there would nevertheless have remained two legal questions: (1) Whether the residuary legacy was valid under the statute of wills, in that the testatrix reserved for herself the right to alter and amend the trust by an act not testamentary in character; *Atwood* v. *R. I. Hospital Trust Co.*, 275 Fed. 513 (C. C. A. 1, 1921), cert. den., 257 U. S. 661; *Olliffe* v. *Wells*, 130 Mass. 221 (1881); and (2) Whether the trusts were valid under the rule against perpetuities as charitable or religious trusts in that their purpose was not to promote the religion of Christian Science, but to preserve the records of the earthly life of its founder (R. 58, 59).

A compromise agreement dated April 26, 1932 was entered into and signed by the legatees, devisees, executors under the will, the heirs, and the Attorney General of Massachusetts (R. 15-32). That agreement provided in substance that the specific and pecuniary bequests to individuals be enforced, but that the bequest of the residuary estate to the alleged charitable trust be disregarded and the net residue of the estate be divided one half to said trust and one half to the heirs. The compromise agreement was approved by the Probate Court pursuant to the Massachusetts compromise statute (Massachusetts General Laws 1932; Chapter 204, §§15-17, set forth in an appendix) and a decree was entered on April

26, 1932 admitting the will to probate, issuing letters testamentary to the executors named therein and directing said executors "to administer the estate of said deceased in accordance with the terms of said will and said agreement of compromise" (R. 39, 40, 60).

Owing to the depression, the executors had difficulty in finding the necessary funds to discharge the pecuniary legacies, totalling approximately $300,000., which, under the terms of the compromise agreement, were entitled to priority in payment before there could be any distribution of the residue. The heirs undertook to finance half of the pecuniary legacies and the residuary legatees the other half. For their part of this financing the heirs formed a corporation known as Longyear Heirs, Inc., to which they assigned their respective interests in the estate in exchange for common stock. Preferred stock was issued to the pecuniary legatees (R. 60).

On July 26, 1933 the executors turned over to Longyear Heirs, Inc. as assignee of the petitioner, the entire distributable share of the petitioner in the residuary estate consisting of $80.17 in cash and a certificate of deposit representing 358 shares of each of three corporations owned by the decedent prior to her death (R. 60, 61).

The Commissioner valued this distributable share of the petitioner at $141,484.03 and treated the whole amount as income for the year in which it was received. The petitioner was thereupon assessed an additional $56,389.65 which he paid on October 16, 1936, together with interest of $8,696.03. Claim for refund was filed November 4, 1936, and after it was rejected, this suit was commenced November 27, 1936 (R. 4, 1).

The first affirmative defense of the amended answer "by way of set-off and recoupment" (R. 51, 52), relates to the Federal estate tax return of the estate of Mary B. Longyear. The Federal estate tax return was filed and the entire tax paid by the executors on November 22, 1932, more than four years before the complaint in this action was served (R. 90). In July 1933 the Commissioner advised the executors that the return correctly showed the tax and there was no deficiency (R. 91). The first suggestion that there was any deficiency in the estate tax on the estate of Mary B. Longyear was contained in the original answer filed in this case on March 11, 1937. When this action was commenced the three-year statute of limitation had barred any additional assessment of estate tax against the executors and the initiation of any proceeding in court for collection without assessment. §310 R. A. 1926; 44 Stat. 9, 77. Also the additional year for proceeding against the transferee by assessment only had expired. §316 R. A. 1926; 44 Stat. 9, 80.

Questions.

1. Is a distribution from a decedent's estate made to an heir by the executors pursuant to an order of the Probate Court, following the compromise of a will contest, exempt from taxation under Section 22(b) (3) of the Revenue Act of 1932, 47 Stat. 169, 178, which excludes from gross income "The value of property acquired by gift, bequest, devise or inheritance * * *"?

2. Is such a distribution income under the applicable Revenue Act and under the Sixteenth Amendment to the Federal Constitution?

3. Where the taxpayer is prosecuting a litigation which, if carried through to a decree in his favor, would not be productive of taxable income, does the compromise of such a litigation render the proceeds taxable income?

4. If such distribution is not subject to income tax, may the Collector set-off against the taxpayer's claim for refund of income tax collected on the same, a claim for additional estate tax against the taxpayer as distributee of the estate's assets, where no such additional tax liability was asserted against the executors or any other person within the applicable period of limitation?

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred:

(1) In holding that the property received by the petitioner from the executors of his grandmother's estate was taxable income under the applicable Revenue Act and under the Sixteenth Amendment of the Constitution of the United States.

(2) In holding that such property was not exempt from taxation under Section 22(b) (3) of the Revenue Act of 1932 which exempts "The value of property acquired by gift, bequest, devise, or inheritance * * *"

(3) In holding that the compromise of the pending litigation constituted a sale or exchange of property.

(4) In holding that the compromise of the pending litigation which if successfully prosecuted to judgment would not have been productive of income, rendered property received under that compromise taxable as income.

(5) In holding that the right to participate as an heir in the decedent's estate, which the petitioner

gave up under the compromise agreement, was not acquired by inheritance.

(6) In holding that the right to participate as an heir in the decedent's estate, which the petitioner gave up under the compromise agreement, had no cost basis to the petitioner.

(7) In holding that the determination of the Federal courts, as to whether the property received by the petitioner was "acquired by * * * inheritance" within the meaning of the exemption provision of the applicable revenue act, is controlled by decisions of the Massachusetts state courts construing the state inheritance tax act.

Summary of Argument.

I. Petitioner was an heir of his grandmother and it was solely by virtue of the Massachusetts statute of inheritance that he received *any* property from his grandmother's estate. The *amount* of the property received was determined by the compromise agreement which was made effective by the compromise statute. The Probate Court directed transfer of one-half the residuary estate to the heirs who were not entitled to it under the will but who would be entitled to inherit if there were no will. Therefore it must be an inheritance. Section 22(b) (3) of the Revenue Act should be construed to include every transfer of property at death by every statutory method or general rule of law.

II. The rule of the Massachusetts state courts that the state inheritance tax shall be levied upon the estate created by the will unaffected by the compromise agreement is based on a fictional devolution of property and is not binding on the Federal courts in determining whether the property received by the

petitioner constituted income. The Massachusetts decisions do not touch upon the question whether the property was acquired by inheritance.

III. The proceeds of a claim in litigation which would not be income if the claim were prosecuted to judgment, cannot be transformed into income by a compromise.

IV. The property received by petitioner was not income under the applicable Revenue Act and the Sixteenth Amendment because:

A. Petitioner derived no gain from his capital, from his labor or from both combined. Petitioner was not investing his capital; he was suing to get it. Obviously the property received was not the result of petitioner's labor.

B. A compromise is not a sale, conversion or exchange of capital assets. The contention that petitioner and the other heirs had only a right to contest probate which they exchanged for one-half the residuary estate, involves an assumption that the residuary legatees had title to the residuary estate. There is at least as much presumption in favor of the heirs as in favor of the residuary legatees. This is a case of conflicting claims to the residuary estate. The parties did not exchange these conflicting claims. Each accepted one-half in satisfaction of the claim to the whole.

The theory that a compromise is a sale or exchange is not only logically untenable, but the practical results are absurd. Under such a theory the taxpayer has only the right to sue. This can be valued only after a trial, at least in part, of the controversy compromised. Thus the litigation which the compromise was intended to avoid, will become necessary in an income tax proceeding.

C. Even if the compromise be regarded as a sale or exchange, petitioner's chance of success was at least fifty per cent, which was the proportion received of the property claimed. The record amply shows this. The price paid on the compromise should be at least presumptive, if not conclusive evidence on this point. Otherwise, there must be a trial of the will contest to determine whether petitioner's chance of success was fifty per cent or greater.

V. The first affirmative defense alleges, hypothetically, that if there was an improper deduction in computing the estate tax on Mrs. Longyear's estate, the petitioner should not be allowed to recover. Such a pleading is frivolous and condemned by the New York authorities which are controlling under the Conformity Act.

VI. Even if a deficiency in estate tax had been properly pleaded and proved, there could be no equitable set-off or recoupment against the petitioner because the Commissioner has never allowed the overpayment of income taxes which is in litigation here. Even if he should hereafter allow it, under Sections 607 and 609 R. A. 1928 (45 Stat. 791, 874, 875) he could not credit such overpayment against a deficiency in estate taxes because any liability for such a deficiency was barred before this action was commenced.

The so-called doctrine of equitable set-off and recoupment whereby a stale claim is revived, ought not to be applied in favor of the Government because in the collection of taxes the usual procedure is reversed in that the Government collects the tax first and obtains an adjudication afterwards. In a suit for refund of taxes the Government is actually enforcing its claim, although nominally the taxpayer is plaintiff.

In any set-off, therefore, the Government is really enforcing both claims and such a doctrine could be used as an instrument of oppression completely nullifying the statutes of limitation.

It would be grossly inequitable to set-off against the petitioner, who received one-twentieth of the residuary estate, the entire alleged estate tax deficiency. The petitioner could not recover contribution from the other transferees.

Argument.

POINT I.

The property received by the petitioner was exempt from income taxation by Section 22(b) (3) of the Revenue Act of 1932 which excludes from gross income "the value of property acquired by gift, bequest, devise, or inheritance."

Petitioner was an heir of his grandmother and it was solely by virtue of the statute of inheritance that he received *any* property from his grandmother's estate. Although the *amount* of the property received by him was determined by the compromise agreement which was made effective by the Massachusetts compromise statute [Mass. G. L. (1932) Ch. 204, Secs. 13-18 (See Appendix)] nevertheless, the statute of descent and distribution was still the proximate cause of petitioner's receiving the property.

The fact that Mrs. Longyear's will was probated and filed with the compromise agreement does not prevent the conclusion that the petitioner acquired the property by inheritance. There are many instances where property passes by the law of descent and distribution although a will has been probated. Where a remainder is divested and no gift-over is

provided, on the death of the life tenant the property passes by inheritance. Where a devise or bequest violates the rule against perpetuities or the rule against suspension of the power of alienation, the property passes by inheritance, although the will is probated and the other provisions may be carried out. The general rule is that if the probate court refuses to enforce a provision of a probated will because of certain rules of law, intestacy results and the heirs inherit the property.

Likewise, if a legatee renounces a bequest even after probate of the will, then the heirs would take the property under the inheritance statute. In fact the compromise in the present case might be viewed as a renunciation of one-half of the residuary estate by the residuary legatees and unquestionably the heirs would take by inheritance.

If the probate court had power to divide the property between the heirs and the legatees in a doubtful case of testamentary capacity, much as the admiralty courts have power to divide damages in collisions at sea, then there could be no question that the property received by the heirs would be an inheritance. Actually the compromise statute of Massachusetts gives the probate court power to divide the property in a doubtful case in accordance with the provisions of a compromise agreement which the parties may enter into. The transfer to the heirs cannot be any less an inheritance because they entered into a compromise agreement consenting to take half instead of all the property to which they claimed to be entitled.

Surely the word inheritance as used in Section 22 (b) (3) cannot be limited to the case of complete intestacy, viz. where the decedent left no will whatever. We submit that it must include every transmis-

sion of property to a person who would be entitled under the statute of descent and distribution.

Although it is not necessary to sustain a reversal of this case, we contend further that Congress, in using the broad language—"acquired by gift, bequest, devise or inheritance,"—intended to exclude from income taxation property transferred from a decedent by every statutory method or general rule of law in effect in each of the states. The word "inheritance" in a Federal tax statute should have a broad, national significance, and not be limited solely to the operation of the particular state statute of descent and distribution, operative where there is no will.

There are many rules of law by which property may be transmitted from a decedent, some of which are as follows: (1) the laws of descent and distribution if no will is probated; (2) the law permitting the probate of a will with the requirements as to testamentary capacity, absence of undue influence, etc.; (3) the law permitting distribution of the estate where there is a contest in accordance with a compromise agreement approved by the court; (4) the law relating to dower and curtesy; (5) the law relating to election by a surviving spouse to take his or her intestate share against the will; (6) the law relating to renunciation of legacies, and (7) the law directing the disposition of the excess above the statutory limit of a bequest to charity.

We submit that, whichever of these laws may govern, any distribution of an estate by executors or administrators pursuant to the decree of a probate

court is within the exemption intended by Congress in Section 22(b) (3).

Suppose a New York resident bequeathed his property in trust for the benefit of his wife for life, under such circumstances as would not defeat an election, with remainder to a stranger, and suppose the wife elected to take half the husband's estate, there being no children. Upon the election the probate court would direct distribution of the property, one-half outright to the wife and one-half outright immediately to the remainderman. N. Y. Decedent Estate Law, §18; *Matter of Curley,* 160 Misc. (N. Y.) 844, 290 N. Y. Supp. 822 (1936); *Matter of Mancinelli,* 158 Misc. (N. Y.) 605, 286 N. Y. Supp. 122 (1936). Neither the wife nor the remainderman would take under the will. The remainderman would get something very different from the legacy under the will; instead of a remainder interest in the whole, he would get a present fee interest in one-half of the estate. The wife would take under the law of descent and distribution, but the remainderman would not because he is not an heir of the testator. Technically the property received by the remainderman is not an inheritance, nor is it a devise or bequest; but, clearly, it could not be subject to income taxes because it is actually a devolution of property pursuant to the order of the probate court distributing a decedent's estate. Our case is much more nearly an inheritance than the property received by the remainderman in the case supposed, because petitioner was an heir of the decedent.

In any event, where a probate court directs transfer of a decedent's property to a person not entitled to it under a will, but who would be entitled to inherit if there were no will, we submit that the property is acquired by inheritance.

POINT II.

The rule of the Massachusetts state courts that the Massachusetts inheritance tax shall be levied upon the estate created by the will, unaffected by the compromise agreement, has no bearing on the question whether the property received by the petitioner was within the exemption of Section 22(b) (3) of the Revenue Act of 1932.

The majority opinion of the court below in holding that petitioner acquired no rights by inheritance relied upon the rule of the Massachusetts courts that an agreement compromising a will contest or a suit for construction of a will is not a modification of the will and the rights of the parties thereto are not testamentary in character. The cases cited and quoted from in that opinion are all dicta on this point except *Baxter* v. *Treasurer*, 209 Mass. 459 (1911). In that case the Massachusetts inheritance tax statute imposed a tax on all property "which shall pass by will or by the laws regulating intestate succession." The court held that the amount of the tax should be determined in accordance with the provisions of the will as written, without reference to the compromise agreement. The following language (p. 463) shows the reasoning of the court:

> "It is important that in the assessment of this tax there should be a plain, simple rule. The property upon which the tax is to be assessed is that which passes by will or by the laws regulating intestate succession. When there is a will, whether or not it disposes of the whole estate of the testator, whatever does pass by it passes to the legatees therein named, and by force of the will passes to no other person.

> In view of the nature and office of the compromise statute, and of the language of the tax statute, the most reasonable interpretation of the phrase 'which shall pass by will' in the tax statute is that it describes only property that passes by the terms of the will as written and not as changed by any agreement for compromise made within or without the statute."

The court's reasoning was confined entirely to the words of the statute "which shall pass by will" and apparently it was not argued and the court did not consider, whether the property received by the heir at law passed "by the laws regulating intestate succession".

Thus the Massachusetts court did not even consider the contention we are making here. We contend, not that the Longyear heirs took under the will, but that they took by inheritance, within the ambit of the exemption in a Federal tax statute. §22(b) (3) R. A. 1932. It seems idle to speculate whether the will was "amended" or whether the property "passed by will", or by the compromise agreement. Actually the residuary estate "passed" by the order of the Probate Court, one half to the heirs of the decedent and one half to the residuary legatees.

In the case at bar the compromise agreement could just as well have provided that probate be denied and the residuary estate divided equally between the heirs and the residuary legatees by an administrator to be appointed by the Probate Court. Presumably under the Massachusetts doctrine the inheritance tax would have then been imposed as though the entire residuary estate had gone to the heirs and no exemption would have been allowed to the residuary legatees for the half they actually received. Likewise, presumably the court below would have assessed no in-

come tax against the heirs, but the residuary legatees would have been liable for an income tax had they not been charitable trustees. This illustrates the absurdity of a doctrine which looks solely to the form or machinery by which the compromise agreement is carried out and ignores the actual result of the agreement.

The *Baxter* case really held that the Massachusetts inheritance tax statute taxed a fictional devolution of property which never actually occurred. Therefore the case is not even an authority against our contention that the transfer by Mrs. Longyear's executors to the petitioner was an inheritance or devolution expressly exempted by the income tax statute. Clearly it has no bearing on the broad question whether the property received by the petitioner was income.

The following states have adopted the rule of the *Baxter* case in respect to inheritance taxes: New York (*Matter of Cook*, 187 N. Y. 253, 1907); Kentucky (*Cochran's Exr.* v. *Commonwealth*, 241 Ky. 656, 44 S. W. (2d) 603, 1931); Virginia (*Lynchburg Trust & Sav. Bank* v. *Commonwealth*, 162 Va. 73, 173 S. E. 548, 1934); Arizona (*MacKenzie* v. *Wright*, 31 Ariz. 272, 252 Pac. 521, 1927); California (*In re Rossi's Estate*, 169 Cal. 148, 146 Pac. 430, 1915); Iowa (*In re Wells' Estate*, 142 Iowa 255, 120 N. W. 713, 1909), and Tennessee (*English's Estate* v. *Crenshaw*, 120 Tenn. 531, 110 S. W. 210, 1908).

The opposite rule is in effect in Pennsylvania (*Avery's Estate*, 34 Pa. St. 204, 1859; *Taber's Estate*, 257 Pa. St. 81, 101 Atl. 471, 1917); Rhode Island (*Barber* v. *Westcott*, 21 R. I. 355, 43 Atl. 844, 1899; *Codman* v. *Commissioner*, 50 Fed. (2d) 763, C. C. A.

1, 1931); Georgia (*Taylor* v. *Georgia*, 40 Ga. Appl. 295, 149 S. E. 321, 1929); Minnesota (*Estate of Thorson*, 150 Minn. 464, 185 N. W. 508, 1921), and Colorado (*People* v. *Rice*, 40 Colo. 508, 91 Pac. 33, 1907).

This conflict among the state courts has no bearing on property rights. The Massachusetts group impose the inheritance upon a fictitious devolution; the Pennsylvania group impose the inheritance tax on the estates actually received. Where there is such a conflict among state decisions, this Court has repeatedly held that the Federal revenue law must be uniform in application, and not subject to shifting standards of local jurisdictions. *Burnet* v. *Harmel*, 287 U. S. 103 (1932); *Burk-Waggoner Oil Assn.* v. *Hopkins*, 269 U. S. 110 (1925); *Weiss* v. *Wiener*, 279 U. S. 333 (1929). See *Biddle* v. *Commissioner*, 302 U. S. 573 (1938).

State decisions fixing title and legal rights to property are controlling upon the Federal courts. But state decisions defining the character of ownership of property, the method of devolution of a decedent's estate, or determining whether property received is income or capital, and generally decisions respecting the administration of state tax laws, must be disregarded by the Federal courts in the administration of the Federal revenue laws.

In *Tyler* v. *U. S.*, 281 U. S. 497 (1930), the rules of the state courts of Maryland and Pennsylvania respecting tenancies by the entirety were disregarded and it was held that the whole of the property held by the decedent by the entirety should be included in the gross estate in computing the estate tax. The following language of the Court's opinion seems particularly pertinent, page 503:

> "According to the amiable fiction of the common law, adhered to in Pennsylvania and Mary-

land, husband and wife are but one person, and the point made is, that by the death of one party to this unit no interest in property held by them as tenants by the entirety passes to the other. This view, when applied to a taxing act, seems quite unsubstantial.

"The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions. Whether that power has been properly exercised in the present instance must be determined by the actual results brought about by the death, rather than by a consideration of the artificial rules which delimit the title, rights and powers of tenants by the entirety at common law."

See also *Helvering* v. *Bowers*, 303 U. S. 618 (1938); and *Foster* v. *Commissioner*, 303 U. S. 618 (1938); *per curiam* decisions upon the authority of *Tyler* v. *U. S.*, *supra*.

In *Burnet* v. *Harmel*, 287 U. S. 103 (1932) an oil and gas lease was treated by Texas law as a present sale of oil and gas in place; nevertheless, this Court held that cash received was taxable as ordinary income and not a capital gain. The following sentence from the opinion, p. 110, epitomizes the law:

"The state law creates legal interests but the federal statute determines when and how they shall be taxed."

Other decisions of this Court have settled this principle beyond question. *Merchants' Loan & Trust Co.* v. *Smietanka*, 255 U. S. 509 (1921); *Irwin* v. *Gavit*, 268 U. S. 161 (1925); *Helvering* v. *Butterworth*, 290 U. S. 365, 370 (No. 77 *Pardee* case—1933); *Bankers Pocahontas Coal Co.* v. *Burnet*, 287 U. S. 308. (1932); *Burk-Waggoner Oil Assn.* v. *Hopkins*, 269 U. S. 110 (1925).

Applying this principle to the case at bar, the decree of the Massachusetts Probate Court directing Mrs. Longyear's executors to transfer one half of the residuary estate to the heirs (R. 39, 40) is the decision which is controlling upon the Federal courts in administering the income tax law. That is the decree which fixes the legal and property rights of the parties. The decision in the *Baxter* case imposing the Massachusetts inheritance tax upon a fictitious devolution of property is in no way controlling upon the Federal courts and should be disregarded.

POINT III.

The determination whether property received is income depends, not on whether it was received pursuant to a compromise agreement, but on whether the rights compromised were of a sort to produce income.

If the petitioner and the other Longyear heirs had gone through with the trial of the contest and had obtained a decree denying probate, the property which they would have received would unquestionably not have been income. They would have received the whole estate by virtue of the Massachusetts statute of descent and distribution. Now, because the heirs desired to avoid the expense and publicity of a trial and executed the compromise agreement whereby they received only one-half of the residuary estate, it is claimed that the one-half they actually received is all income.

The genesis of the deficiencies against petitioner and the other Longyear heirs was *Kearney* v. *Commissioner*, 31 B. T. A. 935 (1934), which was cited with approval by the Court below. Until the decision

in the *Kearney* case, it had been well established both in the courts and in the Board of Tax Appeals that the determination of whether property received under a compromise is income or not depends, not on whether it was received pursuant to a compromise agreement, but on whether the underlying rights compromised were of a sort to produce income.

In *Farmers' and Merchants' Bank of Catlettsburg, Ky.*, v. *Commissioner*, 59 Fed. (2d) 912 (C. C. A. 6, 1932), the bank brought suit for injury to its reputation and compromised. The Court held that the sum received under the compromise was not income. The following language from the opinion shows that the Court did not consider that the existence of the compromise agreement had any bearing on whether the amount received thereunder was income (pp. 913-4):

> "The fund involved must be considered in the light of the claim from which it was realized and which is reflected in the petition filed in its action against the Reserve Bank. * * *
>
> "We think that, if petitioner's case had proceeded to a verdict, the law would not have awarded to it what it might have expected to gain but only that which it had actually lost. We are not justified in reading an element into the compromise which was not therein distinctly recognized in fact and would not have been recognized in law. We think therefore that there is no logical basis upon which petitioner could be charged with gain."

In *Strother* v. *Commissioner*, 55 Fed. (2d) 626 (C. C. A. 4, 1932), the owner of the fee of a coal mine brought suit to recover the value of coal extracted by a trespasser and compromised the suit. The Court held that compensation for damage to the mine was not income and disregarded the fact that such compensation was obtained by compromise.

In *Central R. R. of N. J.* v. *Commissioner*, 79 Fed. (2d) 697 (C. C. A. 3, 1935), the railroad brought suit against an officer to recover secret profits and received a large sum in settlement of the action. The Circuit Court of Appeals for the third circuit reversed the Board of Tax Appeals, and held that the money received by the railroad under the compromise agreement was not income. Neither the Board nor the Court considered that the fact that the money was obtained under a compromise agreement had any bearing on the question whether or not it was income. Each analyzed the claim and considered the question as though judgment had been recovered in the suit.

So too the payment to the Chicago & Northwestern Railway of $6,500,000 for undermaintenance during Federal control, which was held to be not taxable income but principal in the case of *Chicago & N. W. Ry. Co.* v. *Commissioner*, 66 F. 2nd 61 (C. C. A. 7, 1933), was a lump sum paid in compromise of much larger claims.

Alimony is not income (*Gould* v. *Gould*, 245 U. S. 151, 1917), and accordingly amounts paid in settlement of or in lieu of alimony, where there is no specific award of alimony in the divorce decree, have been held not to be income. *Jane B. Coates*, 3 B. T. A. 429 (1926); *May R. Spencer*, 20 B. T. A. 58, 66 (1930); *Douglas* v. *Willcuts*, 296 U. S. 1, 8 (1935); G. C. M. 13308, C. B. XIII-2, p. 184 (1934); *Maud H. Bush*, 33 B. T. A. 628 (1935); *Princess Lida of Thurn and Taxis*, 37 B. T. A. 41 (1938).

In *Sol Op.* 132, I-1 C. B. 92 (1922), the Solicitor of the Bureau held that the amount received in compromise of claims for damages for physical injuries and defamation of character, for alienation of affections and for surrender of the right to custody of a

minor child, were not income. The following quotation from this opinion is pertinent:

> "Nor is there a material distinction between payment under an agreement of the parties and payment pursuant to a judgment of a court" (p. 93).

The decision below was in conflict with a prior decision of the Circuit Court of Appeals for the Fourth Circuit (*Magruder* v. *Segebade*, 94 Fed. (2nd) 177, 1938) and such conflict was one of the reasons for the granting of certiorari in this case. In *Magruder* v. *Segebade* a threatened will contest was compromised by the legatees (charities) paying cash to the heirs (and residuary legatees under a prior will), but there was no approval by the Probate or other Court. The heirs brought suit against the Collector for refund of income taxes paid on that receipt of cash. The Circuit Court of Appeals for the Fourth Circuit affirmed a judgment for the taxpayers, citing the decision of District Judge Coxe in the present case with approval. The Circuit Court of Appeals for the Fourth Circuit did not decide whether the receipt was an inheritance, but held that it was not income under the Sixteenth Amendment and particularly the Court adopted the principle enunciated by the authorities cited in this Point that the compromise of a claim does not render the proceeds taxable income if a judgment on the claim would not have produced taxable income. The Court said:

> "The results of a compromise of rights, the proceeds of which rights are not taxable, do not become taxable because the compromise was brought about by an agreement not to litigate" (p. 179).

POINT IV.

The property received by the petitioner from the executors was not income under the applicable Revenue Act or under the Sixteenth Amendment of the Federal Constitution.

The term "income" has been defined by this Court in numerous decisions, as follows:

> "'Income may be defined as the gain derived from capital, from labor, or from both combined', provided it be understood to include profit gained through a sale or conversion of capital assets, * * *". *Eisner* v. *Macomber*, 252 U. S. 189, 207 (1920).

This definition is applied by all courts of the United States and the Board of Tax Appeals; and, as stated by this Court in *Bowers* v. *Kerbaugh-Empire Company*, 271 U. S. 170, 174 (1926), "That definition has been adhered to and applied repeatedly."

Applying this definition to the present case:

A. Petitioner derived no gain from his capital, from his labor, or from both combined.

Petitioner was not investing his capital; he was suing to get it. The amount received under the compromise was not an investment, but a *realization* of the property inherited from his grandmother. It was just as much a realization as if he had recovered his share of her whole estate after a successful contest of the will and a decree denying probate.

Likewise, petitioner, then sixteen years old, did not derive a gain from his labor. Whatever labor his attorneys put into the preparation of the will contest and the negotiations resulting in the compromise, did not produce a gain to him, but merely resulted in

realization of the property inherited from his grandmother.

In *Merriman* v. *Commissioner*, 55 Fed. (2d) 879 (C. C. A. 1, 1931), it was held that a will contest is not a transaction entered into for profit and that attorneys' fees and expenses paid by an unsuccessful contestant are not deductible losses. The Court said (p. 880):

> "When the petitioner brought her suit to break her aunt's will, it was to establish her right to what she must have believed honestly belonged to her. * * * If the litigation had proved successful, she would have received only such part of the testator's estate as justly belonged to her. That would not have been profit, * * * To hold that the expenses of litigation under the existing facts were a deductible loss because incurred in a transaction entered into for profit would be straining the meaning of 'profit' beyond any ordinary or usual meaning of the word and beyond the sense in which it was used by Congress."

If a transaction cannot be productive of income for the purpose of deducting expenses, surely it must be likewise unproductive of income when it is a question of how to treat the avails.

B. A compromise is not a sale, conversion, or exchange of capital assets which can be productive of taxable income.

The heirs of Mrs. Longyear, including the petitioner, if they had any property right respecting her estate, had the right either to the whole estate or to the whole residuary estate. On the other hand, the residuary legatees, if they had any property right, had the right to the whole residuary estate. Thus, disregarding the pecuniary legacies, there were mutually exclusive claims to ownership of the residuary estate.

The compromise agreement which divided the residuary estate equally cannot be regarded as a sale, conversion or exchange of assets, unless it be assumed that either the heirs collectively or the residuary legatees collectively owned the residuary estate. Before the residuary legatees could transfer or exchange half of the residuary estate to the heirs, the residuary legatees must first own it. The conception of the compromise as a sale, conversion or exchange necessarily involves a prejudging of the controversy.

Actually the heirs collectively and the residuary legatees collectively each had a claim to the entire residuary estate. It makes no difference whether it is called a claim or a right to litigate. Obviously the heirs did not transfer to the residuary legatees the heirs' claim or right to litigate, nor was the reciprocal transfer possible, because neither party wanted the other's claim or right to litigate. It cannot be assumed that either party had title to the residuary estate without deciding the merits of the controversy. What actually happened under the compromise agreement was that the heirs and the residuary legatees each collectively accepted one-half of the residuary estate in satisfaction of their claim to the whole.

A compromise, especially of conflicting claims to property, is in its nature a satisfaction and not a sale, conversion or exchange of assets. In the case at bar this is particularly clear for there was no semblance of a sale or transfer of money or property between the heirs and the residuary legatees. The executors transferred one-half of the residuary estate to the heirs and the other half to the residuary legatees.

The Circuit Court of Appeals for the District of Columbia held that the compromise of notes for less than their face value resulted in an ordinary loss and

not a capital loss from the sale or exchange of property; *Hale* v. *Helvering*, 85 Fed. (2d) 819 (1936). The following quotation from the opinion shows the court's reasoning (pp. 821-822):

> "There was no acquisition of property by the debtor, no transfer of property to him. Neither business men nor lawyers call the compromise of a note a sale to the maker. In point of law and in legal parlance property in the notes as capital assets was extinguished, not sold. In business parlance the transaction was a settlement and the notes were turned over to the maker, not sold to him. * * * If the full satisfaction of an obligation does not constitute a sale or exchange, neither does partial satisfaction."

So in the case at bar the mutually exclusive claims to the entire residuary estate were not exchanged or sold; they were extinguished or satisfied by the acceptance of one-half the property claimed.

Warner v. *Walsh*, 15 Fed. (2d) 367 (C. C. A. 2, 1926), established a doctrine that the acceptance by a widow of a life interest under her husband's will was an exchange of her dower interest for such life interest and that income payments made to her by the trustee under the will were not taxable income to her until she had received the value of her dower interest. This doctrine was accepted by other circuits [*United States* v. *Bolster*, 26 Fed. (2d) 760 (C. C. A. 1, 1928); *Allen* v. *Brandeis*, 29 Fed. (2d) 363 (C. C. A. 8, 1928)] and was generally accepted by the Commissioner until it was rejected by this Court in *Helvering* v. *Butterworth*, 290 U. S. 365 (1933). We submit that there is much more reason for treating the widow's election as a sale or exchange than for the theory of the court below that a compromise is a sale, conversion or exchange of assets.

Conceived of as a satisfaction, the determination whether a compromise produces taxable income depends solely on the nature of the claim satisfied, as is set forth in Point III. If collection of a judgment on the claim would not produce taxable income, no gain would result from satisfaction of the claim by way of compromise.

The court below prejudged the controversy by holding that the heirs had no title or claim to the residuary estate, but had merely a right to contest probate which they exchanged for one-half of the residuary estate. There is no more reason for such a holding than there is for presuming that the residuary legatees had no title, but had merely the right to offer the will for probate and endeavor to prove its validity. The Massachusetts Supreme Court has stated:

> "It is obvious enough that no one has any presently ascertained property right in assets which may be affected by a will not yet proved." *Reed* v. *Home National Bank of Brockton*, 1937 Mass. Adv. Sheets, 639, 640, 8 N. E. (2nd) 601, 602.

The ownership of the property depended on the answer to two questions of fact, (1) as to Mrs. Longyear's testamentary capacity, and (2) as to her freedom from undue influence, and on the answer to two questions of law relating to the validity of the residuary bequest. If the answer to *any one* of these four questions should have been favorable to the heirs, their property right in the entire residuary estate would have been established. On the other hand, to establish that the residuary estate belonged to the residuary legatees the answer to *all* of the four questions would have had to be favorable to them; the residuary legatees would have had to win, not only the

will contest, but also a suit to test the validity of the residuary bequest.

Aside from the fact that the conception of a compromise as a sale or exchange is impossible unless there is a decision or presumption as to the validity of the claim compromised, there is a practical difficulty in the application of such a doctrine. There must always be the assumption that the taxpayer had only a right to sue which he exchanged for the money or property received under the compromise. The value of the right to sue depends on the taxpayer's chance of success in the litigation. A court could not measure that chance accurately without hearing the evidence, especially if questions of fact are involved as in the case at bar. In other words determination of the value of the taxpayer's right to sue will require a trial, at least in part, of the litigation compromised. Thus litigants who compromise lawsuits in the expectation of saving the time and expense of litigation will be disappointed because they may have to try out the merits of the controversy with the Commissioner of Internal Revenue in an income tax case in order to establish that their chance of success was at least as valuable as the amount received under the compromise. Unless the decision below is reversed, the effect will be to compel the litigation which the compromise was intended to avoid.

The effect of the decision below is not limited to compromises of will contests. The compromise of any claim which if successfully prosecuted to judgment would not produce taxable income, would impose income tax liability upon at least one party and possibly both parties. Compromises of claims for death or personal injury, damage to property,

defamation of character, seduction, alimony and of all claims of a capital nature would come within the purview of the decision below. Few litigants of such claims will dare to compromise because of the hazard of incurring huge income taxes. Thus, if the decision below is not reversed, the well-established public policy of the courts to encourage compromises and reduce litigation will largely disappear.

C. Even if the compromise agreement be regarded as a sale, conversion or exchange of assets, petitioner realized no profit therefrom.

The majority opinion below reasoned that the petitioner acquired a status as a putative heir of his grandmother before her death, which cost him nothing; that upon his grandmother's death, after his mother's death, that status ripened into a right to contest his grandmother's will and still had no cost basis; and that upon exchange or relinquishment of that right to contest, the entire property received under the compromise was gain (R. 126, 127).

This reasoning completely ignores the fact that whatever right or claim to participate in the residuary estate the petitioner may have transferred or relinquished in the compromise, could not have been acquired otherwise than by inheritance. Death of the testatrix and the Massachusetts inheritance statute were the only sources of petitioner's claim to any participation in the estate. Entirely apart from the question whether, under Massachusetts law, the heirs acquired the property which they actually received by purchase or by inheritance (discussed under Point II), the petitioner's claim to any participation in the residuary estate prior to the execution of the compromise agreement, was based wholly on the fact that he was an heir of Mrs. Longyear. The applicable Rev-

enue Act provides that the basis for personal property received by inheritance shall be its value at date of distribution. R. A. 1932, §113 (a) (5), 47 Stat. 169, 199. Since substantially all of Mrs. Longyear's residuary estate consisted of personal property, its basis must have been its value on the date the heirs received it from the executors. Therefore, the basis value and the value realized would be determined as of the same date. There can thus be no profit to the petitioner unless the heirs' chance of success on the will contest is evaluated at less than the percentage received in settlement. Judge Hand concurred in the decision below solely because the petitioner had failed to sustain the burden in this respect.

Short of introducing the evidence which would have been introduced at the trial of the contest and actually trying the issues involved, it would have been impossible for the petitioner to have gone further in establishing that the heirs' chance of success was at least 50%. Under Massachusetts law the probate court in granting the contestants' motion to frame jury issues must have found that there was a "genuine question of fact supported by evidence of such substantial nature as to afford ground for reasonable expectation of a result favorable to the party requesting the framing of issues." *Smith* v. *Patterson*, 286 Mass. 356, 190 N. E. 536 (1934); *Briggs* v. *Weston*, 1936 Mass. Adv. Sheets 1161, 2 N. E. (2d) 466 (1936). (R. 57). Even if the will had been admitted to probate, the heirs would have contended that the residuary bequest was invalid upon two legal grounds: (1) that the residuary bequest violated the statute of wills in that Mrs. Longyear reserved to herself the right to alter or amend the trust which was to receive the residue, by an act not testamentary in character, and (2) that the residuary bequest was void as a charitable or religious bequest because its purpose was not

to promote the religion of Christian Science, but to preserve the records of the early life of Mary Baker Eddy (R. 58, 59). The guardian *ad litem* of the petitioner and of petitioner's brother was doubtful whether he should accept the settlement, largely because he felt that even if the heirs should lose the contest there was an excellent chance that the residuary bequest would be held invalid on one or both of these grounds (R. 58, 59).

There is no evidence in the record in this case indicating the strength of the proponents' case on the issues of testamentary capacity and undue influence. It is a matter of common knowledge that where a testatrix has cut off her children by a will the children have an excellent chance before a jury in a contest of the will.

The best evidence of the value of the heirs' chance of success is the amount paid in settlement. In practically every other case the price paid upon a *bona fide* transaction is regarded as practically controlling in a valuation of the property sold. Nevertheless, in the present case Judge Hand in effect held that the compromise was not *bona fide* and, therefore, that the price paid for the alleged "exchange" was insufficient evidence of its value to constitute a cost basis to petitioner. He said:

> "On the record before us it is quite impossible to say whether the bequest for the benefit of the Longyear Foundation was reduced under the agreement because of the legal strength of the contestant's position or because of avoidance by the Foundation of the expense and annoyance of litigation, or of its belief that to retain so large a portion of the estate against the protest of the relatives as would pass to it under the literal terms of the will would be unwise as a matter of

policy. That many considerations other than the weighing of strict legal rights dictate the settlement of will contests is notorious" (R. 130). There is no evidence in the record to justify any such finding or conclusion. Clearly the doctrine of judicial notice should not extend to the mental processes of officers of a charitable institution in determining whether to accept a compromise or prosecute a litigation respecting the validity of a will containing a bequest for the benefit of such charity. Furthermore under Section 17 of the Massachusetts Compromise Statute (see Appendix) the Probate Court must have approved the reasonableness of the compromise with respect to the charitable residuary legatees.

On the other hand, the record shows that the principal consideration of the four living children in accepting the compromise was the avoidance of publicity and unpleasantness of a trial (R. 59).

We respectfully submit that an attempt to speculate upon the motives which induced parties to enter into a compromise agreement, in order to evaluate the chances of success of one of the parties to the dispute at some figure different from the amount paid by the other party, will result in confusion and possibly chaos in business transactions.

Even if a compromise be deemed to be a sale, conversion or exchange of assets, neither party should be deemed to have realized gain or loss unless there was no real dispute and the compromise was collusive. In *Sterling* v. *Commissioner*, 93 Fed. (2nd) 304 (C. C. A. 2, 1937) which was decided by the Court below shortly before the decision in this case and which was largely the basis of the decision in this case, the alleged dispute compromised was actually not a dispute at all. A title company had raised a

question whether a remainder was vested or contingent. The remainder was unquestionably vested and the Court below decided that Mrs. Sterling (the taxpayer) had no color of claim, and therefore the entire amount received by her under the compromise was income. Without conceding the correctness of the *Sterling* case, we submit that it is distinguishable from our case in that here there was a real dispute involving questions of fact with litigation pending; whereas in the *Sterling* case the dispute compromised involved only a question of law as to which there could really be no doubt.

The amount paid under a *bona fide* compromise of a real dispute ought to be, at least presumptive, if not conclusive, evidence of the valuation of the chances of success of the respective parties to the litigation.

POINT V.

The first affirmative defense "by way of set-off and recoupment" is insufficient.

The second affirmative defense was abandoned by the District Attorney in the court below.

The first affirmative defense (R. 51, 52) alleges in substance that, if the value of the property received by the petitioner under the compromise agreement had not been deducted from Mrs. Longyear's gross estate in computing the estate tax, the estate tax would have been increased in an amount not less than the deficiency in income taxes paid by the petitioner and sought to be recovered in this action; that, if the value of such property "was not a proper deduction from the gross estate for the purpose of the estate tax", petitioner, as transferee and distributee, owed the United States more than he is seeking to recover from the collector in this action (R. 52).

The collector does not allege that any deficiency in the estate tax is due and owing from the petitioner; but, in effect, he alleges that if a mistake was made in computing the estate tax, petitioner equitably should not recover in this action. Such a hypothetical form of pleading is frivolous and is condemned by the New York authorities which, by the Conformity Act (17 Stat. 197), are controlling upon the Federal courts. *Stroock Plush Co.* v. *Talcott*, 129 App. Div. (N. Y.) 14, 113 N. Y. Supp. 214 (1908); *Goodman* v. *Robb*, 41 Hun (N. Y.) 605 (1886); *Stevenson & Co.* v. *Victor*, 182 N. Y. Supp. 88 (1920); *Arthur* v. *Brooks*, 14 Barbour (N. Y.) 533 (1853); *Saleeby* v. *Central R. R. of N. J.*, 40 Misc. (N. Y.) 269, 81 N. Y. Supp. 903 (1903).

POINT VI.

The collector could not by any pleading or proof defeat petitioner's recovery under the so-called equitable doctrine of "set-off and recoupment".

The collector's original answer containing a "set-off and recoupment" and petitioner's reply thereto were incorporated in the record (R. 41-48) by the District Attorney although, presumably, both were superseded by the filing of the collector's amended answer. In that original answer the collector alleges that when the plaintiff paid the deficiency in income taxes assessed against him "there was due and owing from the estate to the United States a Federal estate tax in excess of $65,005.68" (R. 43). This allegation was omitted in the amended answer.

The question whether the property received by the heirs should be exempted as going to the charitable

legatees under the Massachusetts doctrine established by *Baxter* v. *Treasurer, supra* (p. 14), was fully argued and briefed by the executors before the Commissioner and the Commissioner finally determined that there was no deficiency in Federal estate tax due from the estate of Mary B. Longyear (R. 102-105, 91). By an agreement between the executors and the Bureau, the legal question was determined before any consideration was given to the values of any of the property transferred to the heirs (R. 47) and the Commissioner's determination made unnecessary any consideration of values. The District Court for the Southern District of New York in this case had no jurisdiction to reverse the final determination of the Commissioner respecting the estate tax due from the executors of a Massachusetts decedent. There was a dispute as to the valuations and since the executors are not parties to this action the court below could not fairly determine the amount of any deficiency in the estate tax, even if it had had jurisdiction.

However, even if there were a deficiency in estate tax determined or determinable in this action, and even if the Commissioner should now allow an overpayment of income taxes for 1933, the Commissioner would be prohibited from crediting that overpayment against such deficiency in estate tax because any claim for estate tax against the petitioner as transferee was barred before this action was commenced. Section 607, R. A. 1928, declares that any payment of a tax after expiration of the period of limitation should be considered an overpayment and directs that it be "credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim". Section 609(a) of the same act provides that "any credit against a liability in

respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under Section 607". This Court said in *McEachern* v. *Rose*, 302 U. S. 56 (1937):

> "These provisions (§§607 and 609 R. A. 1928) preclude the Government from taking any benefit from the taxpayer's overpayment by crediting it against an unpaid tax whose collection has been barred by limitation."

It was held in that case that there could be no credit of an overpayment before the overpayment was ascertained and allowed and if at that time the deficiency was barred any credit of the overpayment against it would be void by Section 609. In the present case the overpayment of income taxes has *never* been allowed, but is being strenuously contested in this Court. Any claim for deficiency in estate tax against the petitioner as transferee was barred before this action was commenced. Therefore the Commissioner could not now allow the overpayment of income taxes and credit it against a claim for an alleged deficiency in estate tax.

The so-called doctrine of equitable set-off and recoupment apparently originated with *Bull* v. *U. S.*, *supra*, 295 U. S. 247 (1935). In that case the Government had collected an estate tax and an income tax on the receipt of the same money. The estate tax was erroneously collected, but the taxpayer's right to recover was barred. This Court held that the Commissioner should have credited the overpayment of estate tax against the deficiency in income tax and the taxpayer was allowed to recover since refund of the estate tax was not barred at the time of the overpayment of income tax. This Court stated that in the collection of taxes the normal process of collecting

debts was reversed and the taxpayer was forced to have his claim adjudicated after payment rather than before, except in cases where administrative hearings were afforded. This Court said (p. 260):

> "But these reversals of the normal process of collecting a claim cannot obscure the fact that after all what is being accomplished is the recovery of a just debt owed the sovereign."

Thus this Court viewed the suit of the taxpayer for refund of income taxes as though it were an enforcement by the Government of its claim for taxes and the Court held that at the time the Government assessed the deficiency for income taxes and enforced payment, it should, in common honesty and equity, have credited the prior overpayment by the taxpayer of Federal estate taxes.

We believe that the effect of *McEachern* v. *Rose, supra,* is that the doctrine of the *Bull* case cannot be applied in favor of the Government in a suit by a taxpayer for refund of taxes. We submit that this conclusion is sound from a practical and equitable viewpoint. While the taxpayer in a suit for refund of taxes is nominally the plaintiff, the substance of the suit is a claim by the Government for additional taxes. When the Government asserts a set-off it actually is asserting both claims, although in the formal aspect of the suit the taxpayer appears to be asserting one claim and the Government the other. From a practical point of view this must be true because, otherwise, the doctrine of the *Bull* case would be an unfair weapon in the hands of the Government by which it could destroy the effectiveness of the statute of limitations. The taxpayer would pay a deficiency at his peril because the Government could rake up a claim barred by

the statute of limitations and set it off in the taxpayer's suit to recover a refund. In fact it could be an instrument of oppression because the Government could collect its claim barred by the statute of limitations by arbitrarily issuing a jeopardy assessment for deficiency in income taxes for some year still open, and in the suit for refund could plead that the taxpayer had not overpaid his tax bill to the United States because of the barred claim.

In the present case all of the other heirs of Mary B. Longyear, except the plaintiff's brother, have filed petitions in the Board of Tax Appeals. Obviously, the Government cannot set-off Federal estate tax liability in any of those proceedings. If set-off is allowed against this plaintiff in this proceeding, he will thereby be compelled to pay substantially the whole of the Federal estate tax solely because he paid the deficiency instead of filing a petition in the Board of Tax Appeals. Thus, the result of attempting to apply the doctrine of the *Bull* case in favor of the Government in suits for refund of taxes will be to discourage prompt payment of taxes to the Government. A taxpayer who pays his tax and sues to recover ought to be in at least as favorable a position as a taxpayer who petitions to the Board of Tax Appeals.

The collector may assert that *Stone* v. *White,* 301 U. S. 532 (1937) rather than *McEachern* v. *Rose, supra,* is applicable to this case because it would be inequitable for the petitioner to recover since he equitably owes the Government as transferee a larger amount for Federal estate tax and interest. The cases were distinguished (*McEachern* v. *Rose, supra,* pp. 62, 63) upon the ground that §§607 and 609 did not apply to crediting the amount which one taxpayer had paid against the tax which another should have paid. In

the present case the Commissioner is seeking to credit an overpayment of income taxes against an alleged claim for estate taxes against the *same* taxpayer and this is clearly prohibited under the decision in *McEachern* v. *Rose.*

To apply the equitable doctrine of *Stone* v. *White* in the present case would result in gross unfairness to the petitioner. If a claim for a deficiency in the Federal estate tax due from Mrs. Longyear's estate had been timely made, it would have been paid by the executors before the estate was distributed and the residuary legatees would have borne one-half (R. 21, 22, 23, 24, 25). Plaintiff received one-tenth of the share of the residuary estate going to the heirs under the compromise agreement and consequently would have borne one-twentieth of the Federal estate tax. If this set-off is now allowed he will be compelled to pay substantially the entire alleged deficiency in Federal estate tax. To compel petitioner to bear more than one-twentieth of any alleged estate tax deficiency would be a travesty upon equity and justice.

The collector in the court below relied upon *Phillips-Jones Corporation* v. *Parmley,* 302 U. S. 233 (1937) to establish the proposition that the petitioner would have a right of contribution against the other transferees from the estate. In that case the Commissioner assessed additional income and profits taxes against a corporation within the period of limitation, but after the corporation had liquidated and distributed its assets to its stockholders. The Commissioner assessed against one stockholder, Phillips, as transferee, the entire amount of the unpaid assessment, and collected it. Phillips sued the other stockholders for contribution. The District Court dismissed the bill and the Circuit Court of Appeals for

the Third Circuit affirmed on the ground that there had been no assessment against the other stockholders, 88 F. (2d) 958 (1937). This Court reversed and sustained Phillips' right to contribution on the ground that the assessment created a debt of the corporation which was a common burden and that to recover the plaintiff need only prove "that there was a common burden of debt and that he has, as between himself and the defendants, paid more than his fair share of the obligations" (p. 236). In *Stone* v. *White* this Court expressly negatived the idea that it was reviving a stale claim by way of set-off as is shown by the following (p. 539):

> "Here the defense is not a counter demand on petitioners, but a denial of their equitable right to undo a payment which, though effected by an erroneous procedure, has resulted in no unjust enrichment to the government, and in no injury to petitioners or their beneficiary. The government, by retaining the tax paid by the trustees, *is not reviving a stale claim.* Its defense, which inheres in the cause of action, is comparable to an equitable recoupment or diminution of petitioners' right to recover." (Italics ours.)

Therefore, in the present case if the petitioner's recovery were defeated under the doctrine of that case, he would not be paying a claim or debt of the executors of Mrs. Longyear's estate and there would be no basis for contribution against the other transferees of the estate because he would not have paid a "common burden of debt". Furthermore, the compromise agreement contained no provision for the payment by the residuary legatees of any taxes assessed after the division of the estate.

To allow the collector to set-off against one who received one-twentieth of the residuary estate sub-

stantially the entire alleged estate tax deficiency, would be shockingly inequitable and clearly not within the doctrine of *Stone* v. *White*.

LAST POINT.

The decision and order on mandate of the Circuit Court of Appeals for the Second Circuit should be reversed, and the judgment of the District Court for the Southern District of New York should be affirmed.

Respectfully submitted,

J. M. Richardson Lyeth,
Will R. Gregg,
Allin H. Pierce,
Counsel for Petitioner.

September, 1938.

Appendix:

Massachusetts General Laws 1932, chapter 204, sections 13-18.

COMPROMISES, ETC.

SECTION 13. The probate court may authorize an executor, administrator, guardian, conservator, receiver, commissioner or other fiduciary officer appointed by it, or a trustee, to adjust by arbitration or compromise any demand in favor of or against the estate by him represented.

SECTION 14. The supreme judicial court or the probate court may authorize an executor, administrator, guardian, conservator, receiver, commissioner or other fiduciary officer appointed by the probate court, or a trustee, to adjust by arbitration or compromise any controversy or question as to the administration or distribution of the estate in his possession, or as to his accounting therefor, or as to any matter relating to said estate, or as to the construction of a will or trust created by a written instrument, or as to his power and authority thereunder, or as to any controversy growing out of said will or instrument that may arise between him and any other person or the guardian or conservator of any person interested under said will or instrument or in said estate, or between claimants or the guardians or conservators of claimants to said estate, to which arbitration or compromise, in the form of an agreement in writing, such executor, administrator, guardian, conservator, receiver, commissioner or other fiduciary officer or trustee, and all other persons in being and of full age and not under guardianship, and the guardian or conservator, if any, of all other persons

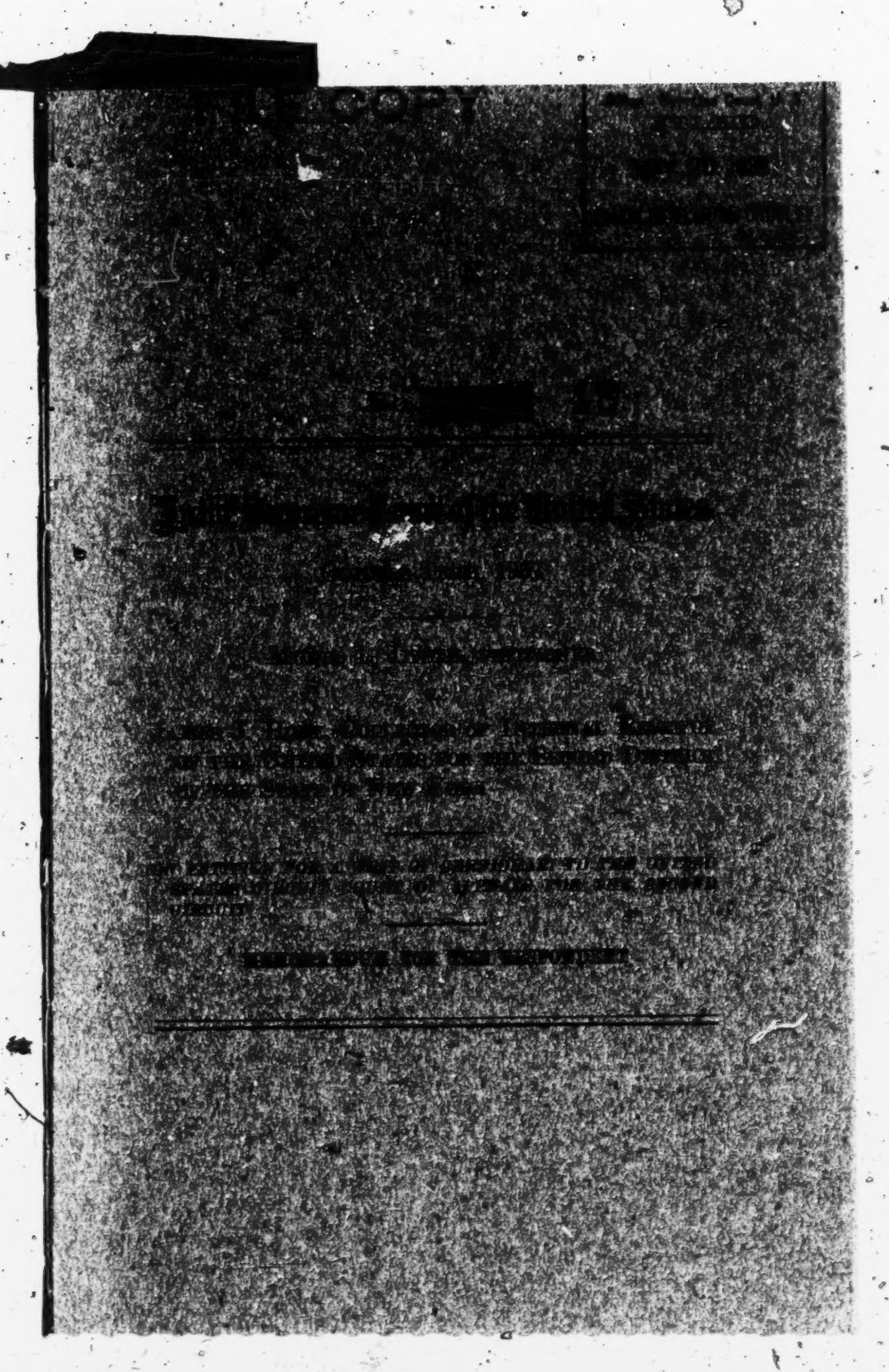
who claim a vested interest in said estate, whose interests will, in the opinion of the court, be affected by the proposed arbitration or compromise, shall be parties. An award or compromise made in writing in such a case, if found by the court to be just and reasonable in its effects upon the interests of minors and persons under guardianship or conservatorship, and upon any future contingent interests in said estate, shall, when approved by the court, be valid and binding upon all such interests and upon the original parties to said agreement, and a decree shall be entered accordingly. If the court finds that any minor or person without legal capacity or under guardianship, or any future contingent interests, may be affected, it may appoint some person or persons to represent such minor or person without legal capacity or under guardianship, or future contingent interests in such controversy, question, administration or account upon such conditions as to costs as it may order.

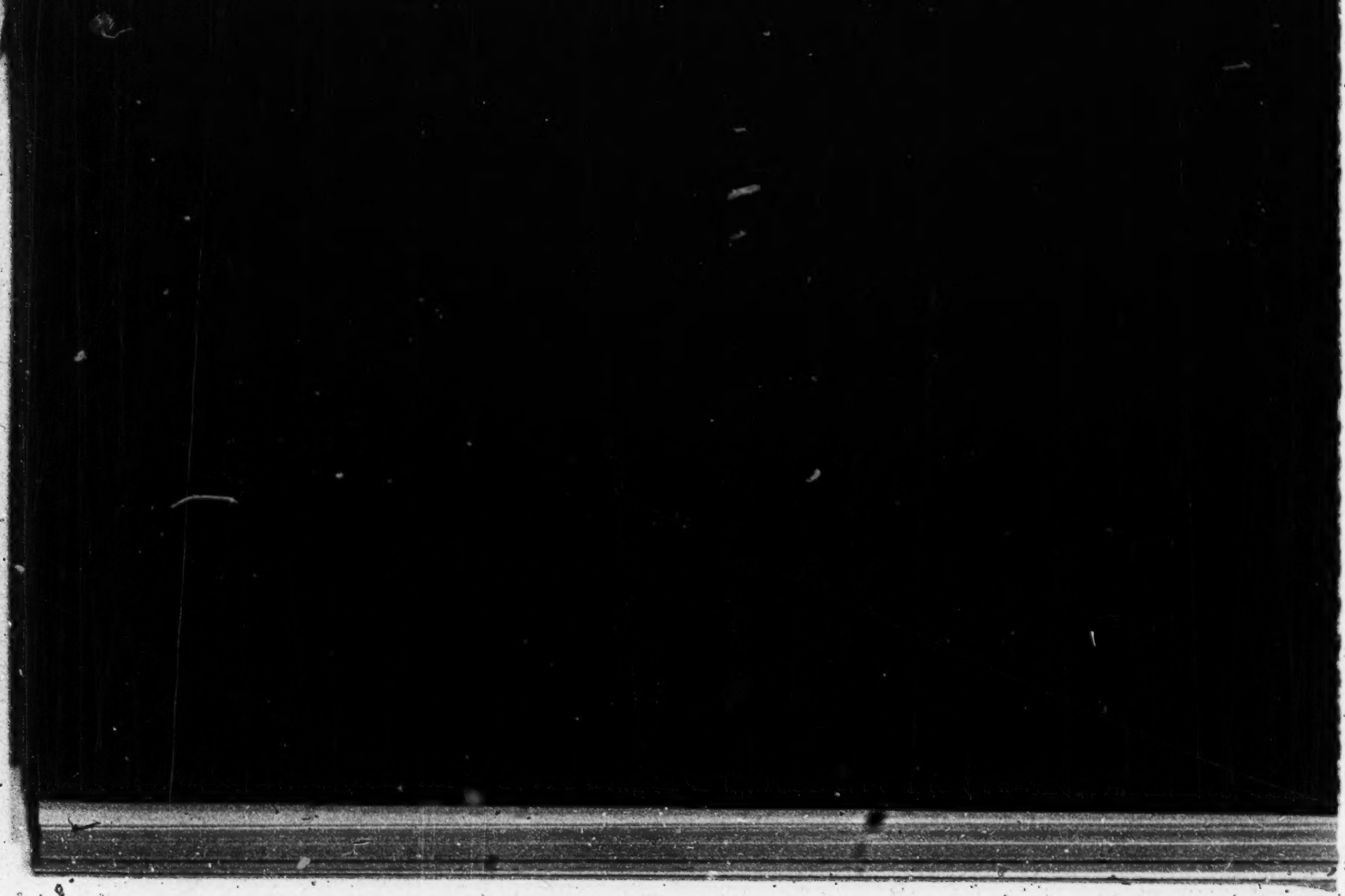
SECTION 15. The supreme judicial court or the probate court may authorize the persons named as executors in an instrument purporting to be the last will of a person deceased, or the petitioners for administration with such will annexed, to adjust by arbitration or compromise any controversy between the persons who claim as devisees or legatees under such will and the persons entitled to the estate of the deceased under the laws regulating the descent and distribution of intestate estates, to which arbitration or compromise the persons named as executors, or the petitioners for administration with the will annexed, as the case may be, those claiming as devisees or legatees whose interests will, in the opinion of the court be affected by the proposed arbitration or compromise, and those claiming the estate as intestate, shall be parties.

SECTION 16. If the court finds that any future contingent interests which would arise under said will if admitted to probate would be affected by the arbitration or compromise, it shall appoint some person to represent such interests in such controversy, and the court shall have like power as to any bequests made in the will for charitable purposes, if no trustees have been appointed in such will; in both cases with such conditions as to costs as the court orders.

SECTION 17. An award or compromise made in writing in any such case, if found by the court to be just and reasonable in relation to the parties in being and in its effect upon any future contingent interests that might arise under such will and upon any bequests to charities made in the same, shall be valid and binding upon such interests and upon such bequests, as well as upon the interests of all persons in being, but it shall not impair the claims of creditors.

SECTION 18. If a minor or a person under guardianship or conservatorship is a necessary party to an arbitration or compromise under section fifteen, he shall be represented in the proceedings by his guardian or conservator, or by a guardian *ad litem* appointed by the court, who shall in the name and in behalf of the party he represents, make and receive all proper conveyances and payments necessary to carry into effect any award or compromise sanctioned by the court.





In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 1042

MUNNO L. LYETH, PETITIONER

v.

JAMES J. HOEY, COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES FOR THE SECOND DISTRICT OF THE STATE OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

We do not oppose the granting of the petition for a writ of certiorari in this case.

The case involves the question whether the value of property received by an heir in settlement of a will contest constitutes taxable income.[1]

[1] The court below did not find it necessary to pass upon the alternative issue of recoupment raised by the Government as an affirmative defense. The Government argued that if the court should hold that no tax was due for the reason that the property received by the taxpayer was an inheritance or bequest, the equitable doctrine of recoupment would prevent recovery of a refund for the reason that as

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The taxpayer is a grandson of Mary B. Longyear, who died on March 14, 1931, a resident of Massachusetts (R. 90). By her will the testatrix bequeathed small legacies to the taxpayer and others, but left the residue of her property, constituting the bulk of her estate, to a charitable trust (R. 51–61, 91). The heirs objected to the probate of the will on several grounds, including a lack of testamentary capacity and undue influence, and, in accordance with the applicable law of Massachusetts, moved in the probate court that jury issues be framed in order that the validity of the will might be determined by trial by jury (R. 91–92). The motion was granted (R. 92), but before the case was tried all the parties in interest entered into an agreement of compromise (R. 24–50) providing for the allowance of the will and the distribution of the estate in accordance with the will and agreement of settlement (R. 96–97).

This settlement was approved by the probate court in a decree which allowed the will, provided for the issuance of letters testamentary to the executors named therein, and directed them "to admin-

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a transferee of the estate he was liable for an additional estate tax resulting from an excessive deduction for charitable bequests. The additional estate tax arises from the fact that the total value of the bequest to the charitable trust under the will was allowed as a deduction in computing the estate tax, instead of the allowance of a deduction of the amount actually received by the charitable trust under the compromise. (R. 82–85.)

ister the estate of said deceased in accordance with the terms of said will and said agreement of compromise" (R. 62–63, 96–97).

As the result of this compromise the taxpayer in 1933 received property determined by the Commissioner of Internal Revenue to be worth $141,484.03, no part of which was reported as income (R. 14). The Commissioner treated the amount as taxable income and assessed an additional income tax, with interest, in the total amount of $65,005.68, which was paid (R. 17). A timely claim for refund (R. 16–22) was filed and rejected (R. 23) and this suit for refund was instituted.

The District Court gave judgment for the taxpayer.[2] On appeal the Circuit Court of Appeals reversed the District Court, holding that the value of the property received under the settlement constituted taxable income. The majority opinion, written by Circuit Judge Chase, holds that the amount received was a gain growing out of the claim to an interest in property; that what the taxpayer received was an amount received not under the will but in spite of the will because of his bargaining position; and that, as what he relinquished in consideration of the receipt of the property under the settlement had no cost basis, the full value of the property received constituted

[2] The District Court also decided against the Government on the recoupment issue (20 F. Supp. 619, 622). See footnote 1, *supra*, p. 1.

taxable income. The court held further that under Massachusetts law an heir who takes under a compromise settlement of the character of the one here involved is regarded as taking by purchase from those who get title under the allowed will; and hence that the value of the property is not exempt as a bequest or inheritance under Section 22 (b) (3) of the Revenue Act of 1932, c. 209, 47 Stat. 169.

Circuit Judge Augustus N. Hand concurred in a separate opinion on the ground that there was no proof that the sum received by the taxpayer in settlement of a will contest was not wholly gain over the value of any right which passed to him on the death of the testatrix; and expressed the opinion that if it had been or could have been shown what the rights of the next of kin to contest the will were worth only the excess received over that value would be taxable income.

The decision of the court below is in accord with the decision of the Board of Tax Appeals in *Kearney* v. *Commissioner*, 31 B. T. A. 935, and is supported by the decision in *Sterling* v. *Commissioner*, 93 F. (2d) 304 (C. C. A. 2nd), certiorari denied, April 11, 1938, No. 839, present Term, which involved an analogous but not identical question.

The petition for a writ of certiorari alleges that the decision of the court below is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Magruder* v. *Segebade*, 94 F. (2d) 177. We agree that these decisions cannot be

distinguished. In the *Segebade* case the court held that an amount received in compromise of a will contest was not income. In that case the taxpayers were legatees under two wills made by the decedent, a resident of Maryland, and in consideration of the receipt of a lump sum they agreed to waive their rights under the first will and not to contest the second which was filed for probate. The court held the amount received was not income under the Sixteenth Amendment and the statute involved and found it unnecessary to consider whether it was exempt as a bequest or inheritance. The payment to the taxpayers was made by the residuary legatees in the *Segebade* case, whereas in this case it was made by the executors pursuant to the order of the probate court; but this distinction is not believed to be material in determining whether an amount received in settlement of a will contest constitutes income. The decision of the District Court in the instant case was relied upon by the Circuit Court of Appeals for the Fourth Circuit in the *Segebade* case, and in the instant case the court below did not distinguish the *Segebade* case.

By reason of this conflict and of the general importance of the question we do not oppose the granting of the petition.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

MAY 1938.

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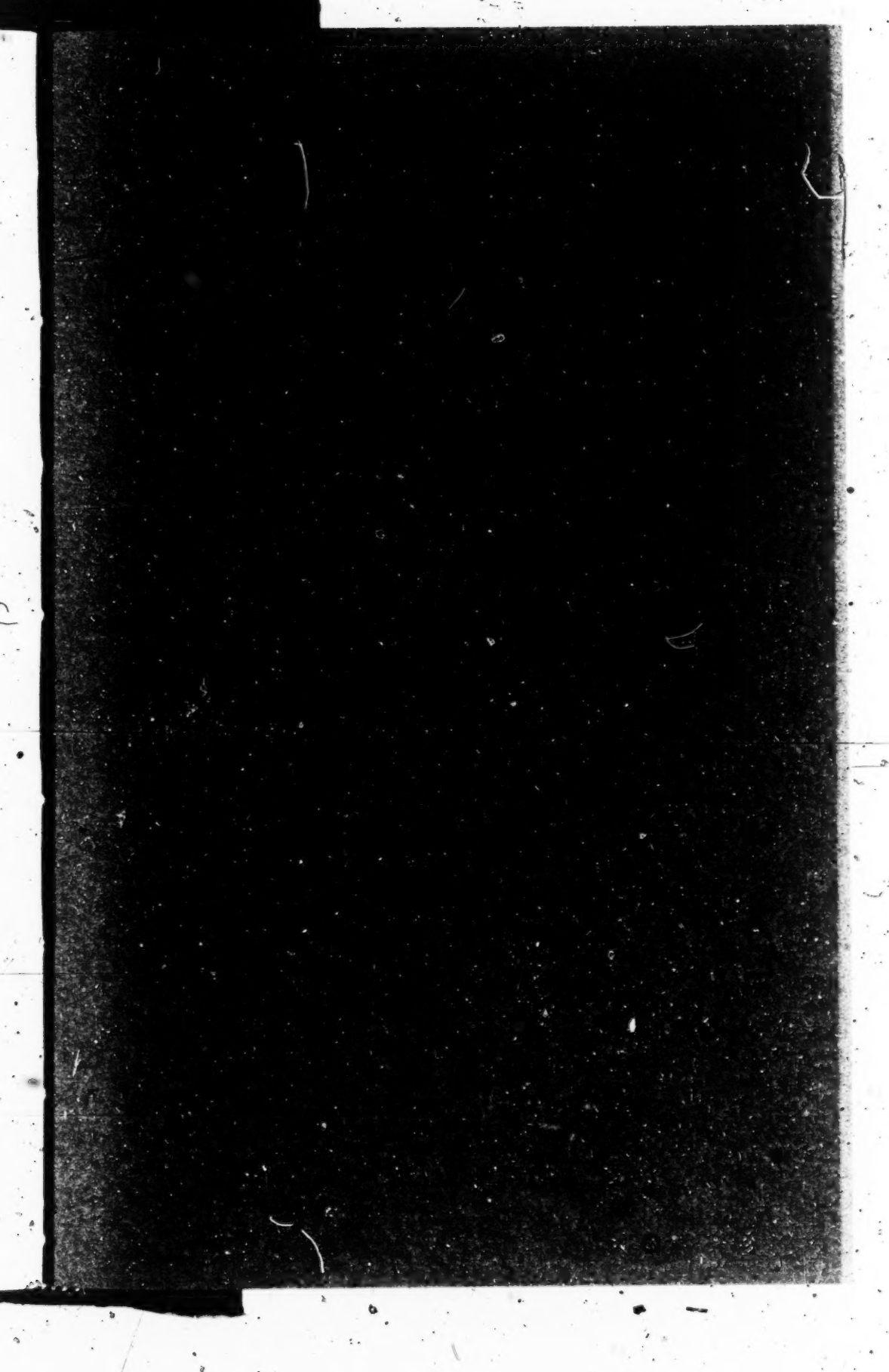


INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions involved	2
Statutes and other authorities involved	2
Statement	2
Summary of argument	7
Argument:	
I. The property received by the petitioner under the compromise of the will contest was not a bequest or inheritance and is not exempt from tax under Section 22 (b) (3) of the Revenue Act of 1932	13
II. The amount received in settlement of the will contest constituted income within the meaning of Section 22 (a) of the Revenue Act of 1932 and the Sixteenth Amendment	36
Conclusion	69
Appendix A	70
Appendix B	76

CITATIONS

Cases:	
Acme Land & Fur Co. v. *Commissioner*, 84 F. (2) 441	58
Avery's Estate, 34 Pa. St. 204	20
Bank of Commerce v. *Tennessee*, 161 U. S. 134	27
Barber v. *Westcott*, 21 R. I. 355	19
Baxter v. *Treasurer & Receiver General*, 299 Mass. 459	18, 26, 31, 34
Beals' Estate v. *Commissioner*, 82 F. (2d) 268	52, 54
Blair v. *Commissioner*, 300 U. S. 5	30
Bowers v. *Kerbaugh-Empire Co.*, 271 U. S. 170	68
Bowers v. *Lawyers Mortgage Co.*, 285 U. S. 182	27
Brandeis v. *Atkins*, 204 Mass. 471	18, 34, 35
Brown v. *Helvering*, 291 U. S. 193	68
Brown v. *McLoughlin*, 287 Mass. 15	34, 35
Bruce v. *Helvering*, 76 F. (2d) 442	55
Brushaber v. *Union Pac. R. R.*, 240 U. S. 1	68
Bull v. *United States*, 295 U. S. 247	43, 46, 49
Burke-Divide Oil Co. v. *Neal*, 73 F. (2d) 857	66
Burnet v. *Harmel*, 287 U. S. 103	28
Burnet v. *Sanford & Brooks Co.*, 282 U. S. 359	51, 68
Burnet v. *Whitehouse*, 283 U. S. 148	63
Center v. *Kramer*, 112 Oh. St. 269	23

Cases—Continued.

	Page
Central P. Co. v. Commissioner, 79 F. (2d) 697	89
Chadwick v. United States, 77 F. (2d) 931, certiorari denied, 296 U. S. 690	53
Chicago, R. I. & P. Ry. Co. v. Commissioner, 47 F. (2d) 990, certiorari denied, 284 U. S. 618	67
Chicago & N. W. Ry. Co. v. Commissioner, 66 F. (2d) 61, certiorari denied, 290 U. S. 672	59, 61
Clemmons v. Commissioner, 54 F. (2d) 200	55
Cochran's Rptr. & Trustee v. Commonwealth, 241 Ky. 656	18
Commissioner v. Langwell Real Estate Corp., 47 F. (2d) 841	67
Continental Illinois National Bank & Trust Co. of Chicago, Executor, Last Will and Testament of Fred E. Jones v. Commissioner, decided July 29, 1938 (B. T. A.)	38
Continental Tie & L. Co. v. United States, 286 U. S. 290	66
Cook, Matter of, 187 N. Y. 253	17
Copeland v. Wheelwright, 220 Mass. 131	32
Cornell v. Coyne, 192 U. S. 418	27
Cox v. Helvering, 71 F. (2d) 987	52, 54
Crooks v. Harrelson, 282 U. S. 55	30
Davis v. Commissioner, 35 B. T. A. 1001	60
Douglas v. Willcuts, 296 U. S. 1	59
Doyle v. Mitchell Brothers Co., 247 U. S. 179	47
Edwards v. Cuba Railroad, 268 U. S. 628	65, 66
Eisner v. Macomber, 252 U. S. 189	12, 18, 47, 50, 51, 54, 61
Ellis v. Hunt, 228 Mass. 39	34, 35
English v. Crenshaw, 120 Tenn. 531	18
Estate of Rossi, 161 Cal. 148	18
Farmers & Merchants Bank v. Commissioner, 59 F. (2d) 912	58, 60, 61
Forbush v. Home for Aged Women, 241 Mass. 433	35
Fredericksen v. Louisiana, 23 How. 445	24
Gould v. Gould, 245 U. S. 151	59, 64
Graves, Estate of, 241 Ill. 212	18
Greenwood v. Holbrook, 111 N. Y. 465	18
Groman v. Commissioner, 302 U. S. 82	47
Hale v. Helvering, 85 F. (2d) 819	48
Hale v. State Board, 302 U. S. 95	27
Heiner v. Colonial Trust Co., 275 U. S. 232	27
Helvering v. Bashford, 302 U. S. 454	47
Helvering v. Butterworth, 290 U. S. 365	22, 43, 49
Helvering v. Claiborne-Annapolis Ferry Co., 93 F. (2d) 875	66
Helvering v. Gowran, 302 U. S. 238	41, 47
Helvering v. Ind. Life Ins. Co., 292 U. S. 371	27, 63
Helvering v. Midland Ins. Co., 300 U. S. 216	50, 56, 67
Helvering v. Salvage, 297 U. S. 106	52
Helvering v. Stockholms &c. Bank, 293 U. S. 84	50

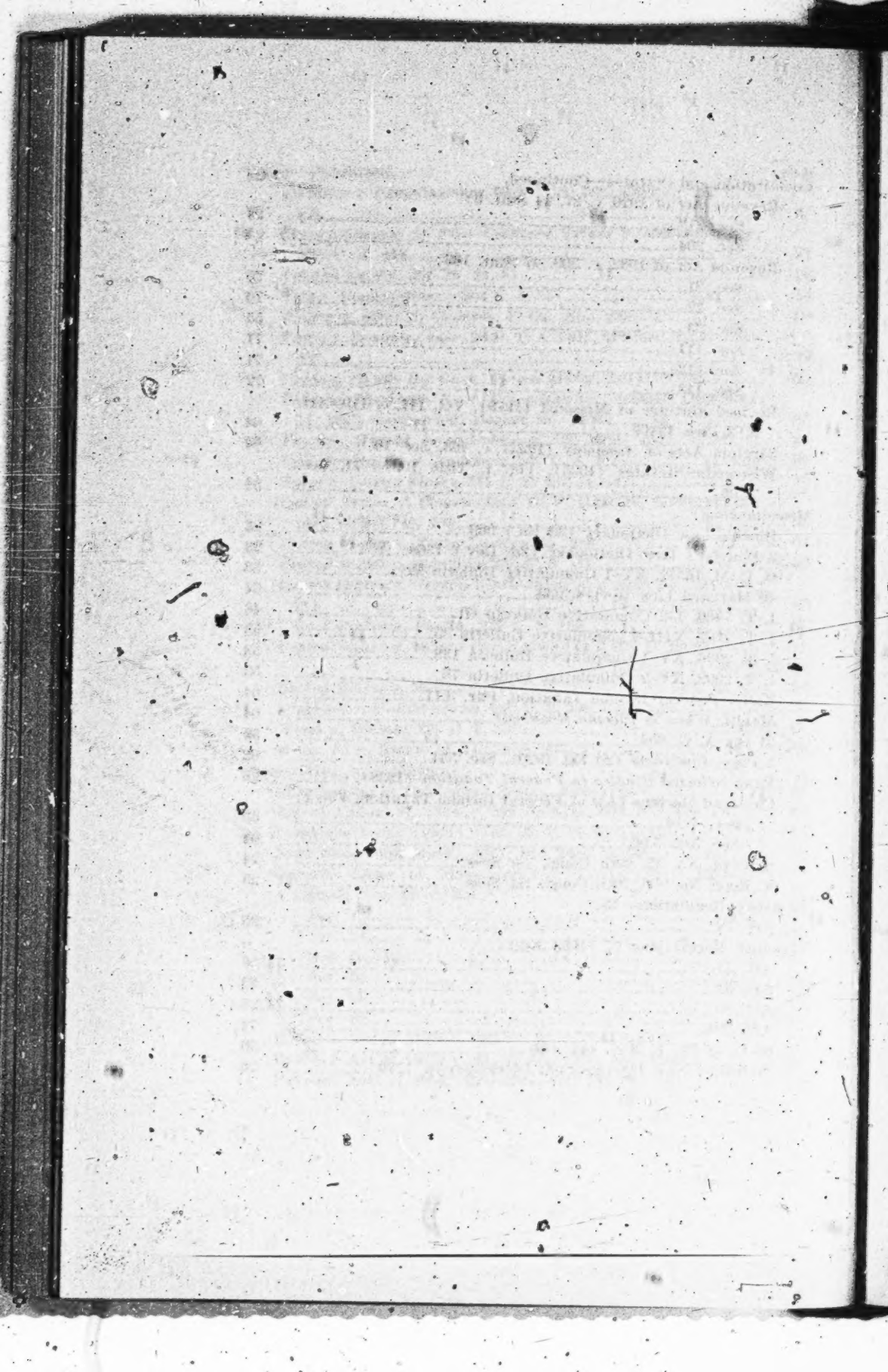
Cases—Continued.

	Page
Helvering v. *Tax-Penn Co.*, 300 U. S. 481	55
Irwin v. *Gavit*, 268 U. S. 161	29, 50
Kearney v. *Commissioner*, 31 B. T. A. 935	38, 49
Kennemer v. *Commissioner*, 96 F. (2d) 177	56
Knowland v. *Commissioner*, 29 B. T. A. 618	60
Knowlton v. *Moore*, 178 U. S. 41	30
Koshland v. *Helvering*, 298 U. S. 441	62
Lang v. *Commissioner*, 289 U. S. 109	8, 16, 29, 40
Liebes & Co., H., v. *Commissioner*, 90 F. (2d) 932	60
Lynchburg Bank v. *Commonwealth*, 162 Va. 73	18
MacKenzie v. *Wright*, 31 Ariz. 272	18
McCoy v. *Gill*, 156 Fed. 985	18
Mager v. *Grima*, 8 How. 490	24
Magruder v. *Segebade*, 94 F. (2d) 177	55
Marine Transport Co. v. *Commissioner*, 77 F. (2d) 177	42
Marr v. *United States*, 268 U. S. 536	47
Maryland Casualty Co. v. *United States*, 251 U. S. 342	66
Maxwell v. *Bugbee*, 250 U. S. 525	24
Merchants' L. & T. Co. v. *Smietanka*, 255 U. S. 509	47, 67
National City Bank of New York v. *Commissioner*, decided July 11, 1938 (C. C. A. 2d)	53
New Colonial Co. v. *Helvering*, 292 U. S. 435	56
O'Neill, In re, 111 N. J. Eq. 378	18
O'Rear v. *Commissioner*, 80 F. (2d) 473	58
Pachecho v. *Fernandez*, 277 S. W. 197	24
Page v. *Rives*, Fed. Cas. No. 10,668	18
People v. *Rice*, 40 Colo. 508	20
Pepper's Estate, 159 Pa. 508	20
Phipps v. *Commissioner*, 91 F. (2d) 627, certiorari denied, 302 U. S. 742	27
Poe v. *Seaborn*, 282 U. S. 101	30
Rau v. *United States*, 260 Fed. 131	53
Rice v. *Eisner*, 16 F. (2d) 358, certiorari denied, 273 U. S. 764	63
Sabatini v. *Commissioner*, decided August 4, 1938	53
Salvage v. *Commissioner*, 76 F. (2d) 112	52, 54
Sanford's Estate, In re, 90 Neb. 410	18
Shellabarger v. *Commissioner*, 38 F. (2d) 586	62
Sly, W. W., Manufacturing Co. v. *Commissioner*, 24 B. T. A. 65	59
Smith v. *Commissioner*, 78 F. (2d) 897	36
Smithsonian Institution v. *Meech*, 169 U. S. 398	21
Spring City Foundry Co. v. *Commissioner*, 292 U. S. 182	68
State v. *Probate Court*, 143 Minn. 77	21
State ex rel. Pettit v. *Probate Court*, 137 Minn. 238	24
Sterling v. *Commissioner*, 93 F. (2d) 304, certiorari denied, 303 U. S. 663	41, 42, 48
Stratton's Independence v. *Howbert*, 231 U. S. 399	47

Cases—Continued. Page
Strother v. Commissioner, 55 F. (2d) 626, affirmed, 287 U. S. 314 ..... 57, 61
Superintendent of Five Civilized Tribes v. Commissioner, 295 U. S. 418 27
Taber's Estate, 317 Pa. St. 51 20
Taft v. Commissioner, 304 U. S. 351 14
Taylor v. State of Georgia, 40 Ga. App. 295 20
Terry v. Commissioner, 29 B. T. A. 1438, affirmed, 69 F. (2d) 980 29
Texas & Pacific Ry. Co. v. United States, 253 U. S. 285 65
Thomas, Elizabeth R., v. Commissioner, decided December 17, 1937, unreported, Docket No. 79304 65
Thorsen, Harold, In re Estate of, 180 Minn. 494 20
Tyee Realty Co. v. Anderson, 240 U. S. 115 68
Tyler v. United States, 281 U. S. 497 16
United States v. Commerford, 64 F. (2d) 28, certiorari denied, 289 U. S. 759 53
United States v. Kirby Lumber Co., 284 U. S. 1 ..... 51, 67
United States v. Morrison, 303 U. S. 170 ..... 14, 17, 28, 63
United States v. Oregon-Washington R. & Nav. Co., 251 Fed. 211 63
United States v. Phellis, 257 U. S. 156 55
United States v. Safety Car Heating Co., 297 U. S. 88 ..... 44, 46, 49, 58, 60
United States v. Sullivan, 274 U. S. 259 54
Uterhart v. United States, 240 U. S. 598 ..... 28, 30
Weiss v. Wiener, 279 U. S. 333 ..... 28, 67, 68
Wells, In re Estate of, 142 Iowa 255 ..... 18, 19

Constitution and Statutes:
Constitution of the United States, Amendment XVI 70, 63
Act of August 27, 1894, c. 349, 28 Stat. 509, 553, Sec. 28 63
Delaware Laws (1921), Vol. 32, c. 9, Sec. 3 (a) 64
Iowa Code Supplement, 1907, Sec. 1467, p. 307 19
General Laws of Massachusetts, Tercentenary Edition (1932), Vol. II, c. 204:
Sec. 13 76
Sec. 14 76
Sec. 15 77
Sec. 16 78
Sec. 17 78
Sec. 18 78
Revenue Act of 1916, c. 463, 39 Stat. 756, Sec. 4 63
Revenue Act of 1917, c. 63, 40 Stat. 300, Sec. 1200 64
Revenue Acts of 1918, 1921, 1924, Sec. 213 (b) (3) 24

Constitution and Statutes—Continued.	Page
Revenue Act of 1926, c. 27, 44 Stat. 9:	
Sec. 218	24
Sec. 204	24
Revenue Act of 1932, c. 209, 47 Stat. 169:	
Sec. 21	70
Sec. 22	70
Sec. 23	54
Sec. 111	71
Sec. 112	71
Sec. 113	72
Revised Statutes of Missouri (1919), Vol. III, c. 119, Art. XIX, Sec. 13109	64
Virginia Acts of Assembly (1922), c. 463, Sec. 10	64
Wisconsin Statutes (1925), Vol. 1, Title 10, c. 71, Sec. 71.05	64
Miscellaneous:	
Black's Law Dictionary (3d Ed.) 963	23
2 Bouvier's Law Dictionary (3d. Rev.) 1568	23
G. C. M. 16572, XV-1 Cumulative Bulletin 82	53
46 Harvard Law Review 903	64
I. T. 1466, I-2 Cumulative Bulletin 60	48
I. T. 2767, XIII-1 Cumulative Bulletin 35	53
I. T. 2976, XV-1 Cumulative Bulletin 138	53
I. T. 2992, XV-2 Cumulative Bulletin 75	53
Klein, Federal Income Taxation, Par. 3.11	64
Magill, *When is Income Realized?*	64
31 Op. A. G. 304	59
1 Page, *Contracts* (2d Ed. 1920), Sec. 554	62
Paul, *Selected Studies in Federal Taxation* (1938), c. 1	28
Paul and Mertens Law of Federal Income Taxation, Vol. I:	
Sec. 5.14	63
Sec. 5.02-5.06	64
S. Rept. No. 52, 69th Cong., 1st Sess.	24
S. Rept. No. 960, 70th Cong., 1st Sess.	25
Treasury Regulations 45:	
Art. 73	25
Treasury Regulations 77 (1933 Ed.):	
Art. 41	73, 50
Art. 51	73
Art. 83	74, 25
Art. 596	74
86 U. of Pa. L. Rev. 443, 444	26
Webster's New International Dictionary, p. 1279	26



In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 48

MUNRO L. LYETH, PETITIONER

v.

JAMES J. HOEY, COLLECTOR OF INTERNAL REVENUE FOR THE UNITED STATES FOR THE SECOND DISTRICT OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court (R. 112–117) is reported in 20 F. Supp. 619. The majority opinion of the Circuit Court of Appeals and the concurring opinion of Judge Augustus N. Hand (R. 124–131) are reported in 96 F. (2d) 141.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 18, 1938 (R. 131–132). The pe-

tition for a writ of certiorari was filed May 18, 1938, and was granted May 31, 1938 (R. 132). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS INVOLVED

1. Whether the value of the property received by the petitioner in compromise of his suit to contest his grandmother's will is exempt from income tax as a bequest or inheritance within the meaning of Section 22 (b) (3) of the Revenue Act of 1932.

2. Whether the value of the property thus received constitutes income within the meaning of Section 22 (a) of the Revenue Act of 1932 and the Sixteenth Amendment to the Constitution.

STATUTES AND OTHER AUTHORITIES INVOLVED

The pertinent statutes and other authorities involved will be found in Appendices A and B, *infra*, pp. 70–78.

STATEMENT

This action was instituted against the Collector of Internal Revenue for the refund of an additional assessment of income tax paid for the year 1933. The plaintiff, who is the petitioner in this Court, filed a motion for summary judgment pursuant to Rule 113 of the New York Rules of Civil Practice. The District Court granted the motion (R. 117–118) and entered judgment for the plaintiff in the sum of $65,005.68, plus interest and costs (R. 119). The

Circuit Court of Appeals reversed the judgment of the lower court (R. 129).

The essential facts appear in the pleadings and the opinion of the District Court as follows:

The petitioner is a resident of New York, and is a grandson of Mary B. Longyear, who died March 14, 1931, a resident of Massachusetts, leaving as her heirs four surviving children and the petitioner and his brother, who were sons of a deceased daughter (R. 2–3, 4, 112).

The estate of Mary B. Longyear was initially inventoried at more than $3,000,000 (R. 4, 112).

By a will executed December 7, 1928 (R. 32–39), the decedent bequeathed to the petitioner and his brother each a portrait, a rug, and $5,000; to the four surviving children certain rugs, portraits, and other personalty, and to two of the four children sums of $10,000 and $5,000, respectively. There were a number of other specific bequests, but the entire residuary estate was bequeathed to the trustees of a so-called Endowment Trust created April 5, 1926, the income from which was payable to another set of trustees under another trust known as the Longyear Foundation. The main purpose of the latter trust was to preserve the records of the earthly life of Mary Baker Eddy, the founder of the Christian Science religion (R. 32–39, 64–69, 70–73, 112–113).

The probate of the will was objected to by all of the heirs, who moved in the probate court of Norfolk County, Massachusetts, that issues be framed

for trial by jury to determine whether the decedent was of sound mind at the time of the execution of the will; whether the execution of the will was procured by fraud or undue influence of John V. Dittemore and A. A. Beauchamp, or either of them; and whether the will was procured to be made in whole or in part by the fraud or undue influence of those individuals (R. 44, 53–54, 113).

The probate court after a full hearing directed that issues be framed for submission to a jury (R. 113).[1]

In this situation a settlement was agreed upon and a compromise agreement, dated April 26, 1932, was entered into and signed by the legatees, devisees, executors under the will, the heirs, and the Attorney General of Massachusetts. This agreement provided in substance that the will should be admitted to probate; that the specific and pecuniary bequests to individuals should be enforced; that a specific bequest to charities and the bequest of the residuary estate to the Endowment Trust should be disregarded; that $200,000 should be paid to the heirs and a like amount to the Endowment Trust and that the net residue of the estate should

[1] The supplemental affidavit of George B. Schoonmaker, Assistant United States Attorney, in opposition to the motion for summary judgment, shows that the proponents of the will stated at the hearing that there were prior wills going back to 1920, all of which expressed the same general purpose of making small gifts to her children and leaving the balance to the Christian Science trust which she had conceived of in 1917. (R. 110–111.)

be divided between the trustees of the Endowment Trust and the heirs. It was provided that the net residue to which the heirs should be entitled should be payable in units of stock of Longyear Estate, Inc., a Delaware corporation, Longyear Corporation, a Delaware corporation, and Longyear Realty Corporation, a Michigan corporation. For that purpose a "unit" was to consist of three shares of stock, one share of each corporation (R. 5–6, 15–32, 113).

The compromise agreement was approved by the probate court, and a decree was entered on April 26, 1932, admitting the will to probate, issuing letters testamentary to the named executors, and directing them "to administer the estate of said deceased in accordance with the terms of said will and said agreement of compromise" (R. 39–40, 113).

The depression was then at its height and the executors had difficulty in finding the necessary funds to discharge the pecuniary legacies, which, under the terms of the compromise agreement, were entitled to priority in payment before there could be any distribution of the residue. The heirs thereupon undertook to finance one-half of the pecuniary legacies and the residuary legatees the other half. For their part of the financing the heirs formed a corporation known as Longyear Heirs, Inc., to which they assigned their respective interests in the estate in exchange for common stock.

Preferred stock in the corporation was issued to the pecuniary legatees (R. 6, 113).

In July 1933 the executors distributed to the petitioner property of the estate consisting of cash in the amount of $61.03 and a certificate of deposit for 358 units under a deposit agreement dated April 20, 1928, with the National Park Bank of New York (now the Chase National Bank of the City of New York), each unit representing one share each of the Longyear Estate, Inc., the Longyear Corporation, and Longyear Realty Corporation. At the request of the petitioner the cash and certificate of deposit were paid over to Longyear Heirs, Inc., as petitioner's assignee (R. 5–6, 114).

The Commissioner valued the petitioner's distributable share at $141,484.03 and treated the whole amount as income for 1933, the year in which it was received. An additional tax of $56,389.65 was assessed, which was paid on October 16, 1936, together with interest of $8,616.03 (R. 3–4, 8–10, 114).

A claim for refund was duly filed November 4, 1936, and was rejected November 19, 1936 (R. 4, 10–14, 15); whereupon this suit was brought against the Collector for recovery of the amount paid (R. 1). In his answers and in his answer to the motion for summary judgment the Collector made affirmative defenses by way of set off and recoupment and by way of estoppel. The amended answer set forth that if the property received by the petitioner under the compromise was exempt

from income tax as a bequest or inheritance, the petitioner nevertheless should be denied recovery of the tax paid on the amount, for the reason that the property in question was not included in the gross estate for Federal estate tax, but was deducted on the theory that it was bequeathed to charitable corporations; that if such property was not a bequest to the charitable corporations, it should not have been deducted from the gross estate and that an additional estate tax in excess of $53,178.50 was due; that the estate had been distributed and the petitioner was liable for the estate tax as a transferee (R. 49–53).

In granting the motion for summary judgment and in entering judgment for the petitioner, the District Court held that the value of the property received under the compromise was not income to the petitioner, and it overruled the affirmative defense (R. 112–117). On appeal the Circuit Court of Appeals reversed the District Court's decision, holding that the amount was income and declining to pass on the affirmative defense (R. 124–129). Judge Augustus N. Hand concurred in a separate opinion (R. 129–131).

SUMMARY OF ARGUMENT

I

The value of the property received by the petitioner in 1933 under the compromise of the will contest was not exempt from income tax under

Section 22 (b) (3) of the Revenue Act of 1932 as "property acquired by bequest, devise, or inheritance * * *."

A

1. Petitioner concedes that he has not received a "bequest." We submit that only property received from a decedent's estate by operation of the laws regulating intestate succession can be an "inheritance," and that here the property was received from the legatees specified in the will and pursuant to a contractual arrangement with them. The property received by petitioner has not passed "from the dead to the living by right of succession." *Lang* v. *Commissioner*, 289 U. S. 109, 112.

2. This conclusion is in accordance with the general doctrines of the various state courts, which regard a contestant like the petitioner as taking contractually from the legatee and not from the testator. They do not consider amounts paid out in settlement as within the ambit of inheritance tax statutes embracing property passing "by will or inheritance," or using similar phrases. The opposite conclusion reached by a small minority of the States may be attributed to a leaning away from the general significance of the words used in the statute in the interests of certain policy considerations.

3. The legislative history of the section, and of a cognate provision, demonstrates that Congress has not referred to property acquired by in-

heritance" in some indefinitely broad sense, to include all dispositions of the property comprised in the decedent's estate, but has used the phrase in a precise legal sense to cover property received by right under the laws governing intestate succession, statutes of descent and distribution. It will not suffice to show a receipt from a legatee, after negotiation, by one who is not privileged to proclaim that he was entitled to the property by virtue of the applicability of the intestacy laws. No significance can be attached to the fact that the distribution to petitioner was ordered by decree of the probate court. This procedure is provided by Massachusetts statute merely to assure that the contract of compromise, of a particularly important nature, will be carried out.

4. Nor can the petitioner's status be improved by the suggestion of a receipt of something "in the nature of" an inheritance. The provision grants an exemption from taxes and must be strictly construed.

B

1. If the use of the words "bequest, devise, or inheritance" does not import a receipt from the decedent, then the provision does not establish its own criteria as to the meaning of those words, and what is a bequest or inheritance must be determined by reference to the state law.

2. The statutes and decisions of Massachusetts clearly establish that the contestant receives his

compromise settlement not from the testator but contractually from the legatee. The title to the property comprised in the decedent's estate devolves by force of the will and is then transferred according to the agreement of compromise.

II

The amount received in settlement of the will contest constituted income within the meaning of Section 22 (a) of the Revenue Act of 1932, which defines "gross income" to include gains derived from "sales, or dealings in property * * * growing out of the ownership or use of or interest in such property," and gains and income "derived from any source whatever." It is also income within the meaning of the Sixteenth Amendment.

The taxpayer received property in consideration of his surrendering and forbearing further to pursue a contest of probate. The transaction may be viewed as a payment in consideration of the surrender by the taxpayer of a property right. Or it may be regarded as a payment made to induce him to refrain from an act detrimental to the legatee in the will. In either case, the property received by petitioner may be taxed as his income.

1. In a broad sense, petitioner's right to contest the will was "property." The negotiations based on that right, and culminating in the compromise, may aptly be designated as "dealings in property," within the meaning of Section 22. The transaction

has been regarded as an exchange of property. *Kearney* v. *Commissioner*, 31 B. T. A. 935.

2. Under Section 111, the gain on the disposition of property is the excess of the amount realized over the basis provided in Section 113. Under Section 113 (a) the basis is cost, with certain exceptions. The only exception that requires consideration is section 113 (a) (5), but that relates exclusively to personal property acquired by specific bequest, by will, or by intestacy. This section has application only to property which was actually part of the decedent's estate and was transmitted by virtue of his will, or under the statutes of descent and distribution to those entitled to succeed him. The basis is cost and the cost is zero, since petitioner's rights cost him nothing.

3. There can be no question but that the gain realized upon an exchange of property for other property of a different kind is taxable under the Sixteenth Amendment.

4. It may be suggested that there was no exchange for the reason that petitioner's claim was of such a contingent and speculative character that it cannot be regarded as representing any capital or property owned by him and surrendered in compromise. But if the consideration for the transfer of property to the petitioner was not itself property, it was the petitioner's promise not to contest the will, and a payment made to induce one to refrain from a course of action that may be detrimental to the payor is income within the meaning of the statute. The statute includes income "from

any source whatever" and reaches pretty much every sort of income subject to the Federal power.

5. Such a payment also constitutes a gain from capital or labor, or from both combined, and, therefore, falls within the definition of income in *Eisner* v. *Macomber*, 252 U. S. 189. It has been held that payments made in consideration of a promise not to engage in a competing business are income. The payment in this case is of a similar character. A payment made to induce another not to act or not to use his resources in a certain way has its source in labor or capital, and is a gain derived from either or both of them.

The case is distinguishable from cases holding that a taxpayer does not realize income on a compromise of a suit brought to recover for injury to capital, since in those cases the amount received compensates him for a loss of capital which was the product of expenditures, and the return of which does not constitute income. At best the petitioner had a highly contingent claim to a part of his grandmother's estate, which had cost him nothing, and which he might never have realized. There has been no loss, but a gain which has been realized through the negative use of the petitioner's resources.

6. But if it be held that the definition of income in *Eisner* v. *Macomber* is not broad enough to include payments made to induce one to refrain from acting or from using one's resources, it should nevertheless be held that such payments constitute income under the Sixteenth Amendment, and the

definition in *Eisner* v. *Macomber* should not be considered all-inclusive. Such receipts represent an accretion to economic worth; they may be expended as income without injuring any existing capital, and they serve the purpose of income. They are also not gifts, but are made for a consideration—namely, the promise to forego a course of action that may injure the payor.

ARGUMENT

I

THE PROPERTY RECEIVED BY THE PETITIONER UNDER THE COMPROMISE OF THE WILL CONTEST WAS NOT A BEQUEST OR INHERITANCE AND IS NOT EXEMPT FROM TAX UNDER SECTION 22 (B) (3) OF THE REVENUE ACT OF 1932

Section 22 (b) (3) of the Revenue Act of 1932 (Appendix A, *infra*, p. 71) provides that there shall be excluded from gross income—

> The value of property acquired by gift, bequest, devise, or inheritance * * *.

In the present case the petitioner received a payment in compromise of a contest over the will of his grandmother, Mary B. Longyear, who died in 1931, leaving an estate inventoried at more than $3,000,000. Under her will, executed in 1928, the petitioner would have received only $5,000, a rug and a portrait, the bulk of the estate going to charity, but under the compromise agreement which was approved by the probate court he received in addition property valued at $141,484.03. The sum was neither an amount received under the will nor the

amount which he would have received had there been no will. The property was transferred to him pursuant to the decree of the probate court, which admitted the will to probate, issued letters testamentary to the executors, and directed them "to administer the estate of said deceased in accordance with the terms of said will and said agreement of compromise" (R. 40). The first question is whether the value of the property so transferred is exempt from income tax as a bequest or inheritance within the meaning of Section 22 (b) (3) of the Revenue Act of 1932, *infra*. No contention is made that it was a gift.

A

1. The statute does not define the terms "bequest" and "inheritance," but they are well understood to mean testamentary dispositions. *United States* v. *Merriam*, 263 U. S. 179, 184; see also *Taft* v. *Commissioner*, 304 U. S. 351, 358. From the context it appears that Congress was dealing with testamentary dispositions. The exempting language is "The value of property acquired by gift, bequest, devise, or inheritance * * *." Just as the word "gift" connotes an *inter vivos* transfer, so it is implicit in the words "bequest, devise, or inheritance" that there be a testamentary transfer, either by specific provision of the will or by the operation of the intestacy laws. In this case the decedent's gift to the petitioner consisted exclusively of the $5,000, the rug, and the portrait. That was his bequest. That property has not been

taxed and is not here involved. What is here sought to be taxed did not come from the decedent, but was derived by the petitioner from the other recipients of the decedent's bounty. True, they paid him with property which they received from the decedent, but the payment was nevertheless theirs and not the decedent's. The petitioner received more than the decedent gave him. He received property which the decedent intended that someone else should have. We submit that his bequest is limited to the property which the petitioner received by virtue of the decedent's direction alone. Petitioner concedes that the additional property here involved which he received by separate arrangement with other beneficiaries does not constitute a bequest, but contends that he took it "by inheritance" (Br. 15). We submit that in no proper sense can it be understood as included within either term.

We do not contend, as suggested by Point III of petitioner's brief (pp. 19–22), that the property involved here is income merely because received as a result of a compromise. Nor do we contend, as suggested by petitioner (Br. pp. 28–29), that the avails of every compromise constitute taxable income. Our position is that the receipt of the property by compromise shows that it is not *exempt income;* that is, not a bequest or inheritance. In other words, we say that only property received pursuant to the direction of a decedent can be a bequest; that only property received from a decedent's estate by the operation of the laws of

intestacy can be an inheritance; and that here the property was received pursuant to an arrangement with the legatees and contrary to the directions of the decedent.

The decision of this Court in *Lang* v. *Commissioner*, 289 U. S. 109, fully supports this view. Upon the sale of lands by the survivor of a tenancy by the entirety, the taxpayer contended that the appropriate basis for determining gain or loss was that prescribed for property "acquired by bequest, devise, or inheritance." This Court held the phrase inapplicable, because the wife did not succeed to anything on the death of her husband. Reliance was placed by the taxpayer on *Tyler* v. *United States*, 281 U. S. 497, holding that the tenancy must be included within the husband's gross estate for estate tax purposes. This Court distinguished the *Tyler* case, and stated (p. 112) that it had not decided "that property held by tenants by the entirety *is inherited by the survivor or passes from the dead to the living by right of succession.*" [Italics added.] This is the factor which is wholly lacking in petitioner's case. The $141,484.03 worth of property received by him cannot be said to be property which passed to him from his dead grandmother by right of succession. The property passed from the charity, and by right of the contractual compromise agreement. It cannot be assumed that he had any right of succession to this property.

2. This conclusion is reenforced by reference to the pronouncements of the various courts of the country. Their delineation of the concepts of "be-

quest, devise, or inheritance" are examined not as state law which is controlling (as to which, see *infra*, pp. 27 *et seq.*), but as an indication of the meaning of the federal law. *United States* v. *Merriam*, 263 U. S. 179, 187: "The word 'bequest' having the judicially settled meaning which we have stated, we must presume it was used in that sense by Congress."

The leading decision is *Matter of Cook*, 187 N. Y. 253 (1907), where the widow instituted contest, and in settlement nephews and nieces of the testator assigned to her their residuary legacies. In considering the correct assessment of the state succession tax, the court said (pp. 259–260):

> The compromise did not change the will. No settlement could change a word that the testator wrote. * * * As we said in another case, she [contestant] takes under them [legatees] "by contract, not under the will or from the testator." (*Greenwood* v. *Holbrook*, 111 N. Y. 465, 471.) * * * Here the legatees took the residuum under the will. They succeeded the testator in the ownership thereof and their succession gives rise to the tax. The widow did not take the residue from the testator, for he did not give it to her. She took as assignee, not as legatee. Unless she took as assignee, she did not take at all. The legatees assigned to her and the rate of taxation is fixed by their relation to the testator.

The same underlying doctrine, that the legatee specified takes under the will and the compromis-

ing contestant derives his rights not from the testator but contractually from the legatee, constitutes the basis of decision in similar cases arising in other States, several of them recently. *English* v. *Crenshaw*, 120 Tenn. 531, 547 (1908); *Estate of Wells*, 142 Iowa 255, 263 (1909); *Estate of Graves*, 242 Ill. 212, 217 (1909); *Baxter* v. *Treasurer*, 209 Mass. 459, 462 (1911); *In re Sanford's Estate*, 90 Neb. 410, 416 (1911); *Estate of Rossi*, 161 Cal. 148, 149 (1915); *MacKenzie* v. *Wright*, 31 Ariz. 272, 275 (1927); *Cochran's Executor* v. *Commonwealth*, 241 Ky. 656, 659 (1931); *In re O'Neill*, 111 N. J. Eq. 378, 379–380 (1932); *Lynchburg Bank* v. *Commonwealth*, 162 Va. 73, 82 (1934).[1] Thus, these courts refuse to consider amounts paid out in the settlement as within the ambit of tax statutes, quoted in

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[1] See also *Page* v. *Rives*, Fed. Cas. No. 10666 (C. C. W. D. Va. 1877), where the court upheld the contention that money received on a will compromise was not within the Federal tax covering legacies or distributive shares in intestate estates. But in *McCoy* v. *Gill*, 156 Fed. 985 (C. C. D. Mass. 1907), the court held that unless the United States regarded the estate as passing under the provisions of a compromise under the Massachusetts statute, it could collect nothing under the Act of June 13, 1898, taxing the passing "by will or by the intestate laws of any state."

The foregoing state cases were all concerned with the proper application of inheritance tax statutes, yet their fundamental and underlying theory concerning the nature of the compromise is part of the general jurisprudence of the State. E. g. *Greenwood* v. *Holbrook*, 111 N. Y. 465, 471; *Brandeis* v. *Atkins*, 204 Mass. 471, which interpret the contract with reference to the will, and by the state law governing the testament, respectively, not as a matter of course but in order to effectuate the intention of the contracting parties.

the opinions, embracing property passing "by will or inheritance;"[3] "by will or by the intestate laws";[4] "by will or by laws regulating descents or distributions."[5]

Reference is made by petitioner to an opposite rule in a minority group of five States. Our suggestion concerning the nature of the compromise, as worked out by courts generally, is in no wise weakened by the fact that in Rhode Island there is a statute specifically regarding the will as "modified" by the compromise, which is accordingly deemed part of the will. *Barber* v. *Westcott*, 21 R. I. 355, 356 (1899). The decisions of the other States display such diversity of theory, in holding that the inheritance tax act should be applied as if the amount in compromise was received by will or intestate succession, as to suggest a utilization of an "equitable" construction of these words, contrary to their general significance, in the interests of certain policy considerations.

Thus in Pennsylvania the court discussed the contrary view as inequitable and working a hardship upon the designated legatees, and used the theoretical basis that to the extent of the amount

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[3] Tennessee. The Iowa statute, cited but not quoted in the opinion in the *Wells* case, reads "property * * * which shall pass by will or by the statutes of inheritance." Iowa Code Supp. 1907, sec. 1467, p. 807.

[4] Arizona; Nebraska; also, but not quoted in the opinions, California and New Jersey. See also Massachusetts ("by will or by the laws regulating intestate succession").

[5] Virginia; Illinois ("property descending, whether under the statute of wills or the statute of descent").

paid in compromise the will is a nullity. *Pepper's Estate*, 159 Pa. 608.[6] In Georgia the contestant is considered taxable because but for the laws of descents and distributions the heir would have no basis for contesting the will, and the agreement had the effect of rendering the will inoperative. *Taylor* v. *Georgia*, 40 Ga. App. 295. The Colorado court merely states that the taxpayer took "by virtue of his heirship." *People* v. *Rice*, 40 Colo. 508, 512. The Minnesota court takes what it considers a just and fair view, consistent with every legitimate claim of the State (*In re Estate of Harold Thorson*, 150 Minn. 464, 468). For a justifying theory, it conceives that the legatee must be deemed to have renounced in part (p. 467).[7] Indeed, the opinion originally establishing the construction for Minnesota seized upon the theory that the State, anxious to discourage litigation, should be bound by the decree approving the compromise either as adjudi-

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[6] As to the other cases cited by petitioner, *Avery's Estate*, 34 Pa. St. 204, involved no compromise, but the situation of a widow who had an undisputed right to dower, and whose taking of less was properly regarded by the court as renunciation. *Taber's Estate*, 257 Pa. St. 81, was a case where the Commonwealth would have been entitled to the same tax whether the estate had passed wholly by will or wholly under intestate laws (p. 83). The basis of the decision was wholly pragmatic, that the estate could not take a deduction from the tax, to the prejudice of the Commonwealth, merely because of a private compromise agreement.

[7] The court was apparently untroubled by the fact that the distribution among the contestants was not strictly pursuant to the laws of intestate succession (p. 465) as would have been the case had there been a true renunciation.

citing partial renunciation or "as a construction of the will, even though erroneous." *State* v. *Probate Court*, 143 Minn. 77, 82.

We submit that the efforts of some state courts to adjust the impact of taxing acts do not really establish a doubt as to the general judicial meaning of the words used by Congress in this exempting provision, in which, of course, any doubt would be resolved against the taxpayer.

3. Petitioner advances the suggestion (Br. p. 10) that the statute of descent and distribution was the "proximate cause" of his receiving the property. In view of the applicability of petitioner's argument to moneys received on all will compromises, it may be appropriate to remark, pursuing the analogy from the law of torts, that a compromise agreement establishes merely that the intestacy laws constitute a "but for" cause, and that, as Judge A. N. Hand observed in his concurring opinion, there are reasons apart from the realms of law why will contests are settled.[8]

It may be conceded that the ultimate cause of petitioner's receipt of the property involved was his position as an heir in the event of intestacy.

[8] Thus Judge A. N. Hand referred (R. 130) to the possible desire of the charitable recipient to avoid the expense and annoyance of litigation, or to settle will contests as a matter of policy. Petitioner's arguments would presumably apply where the heirs were contesting a will leaving property to a favored heir, who might well capitulate lest there be "brought to light matters of private life that ought never to be made public," *Smithsonian Institution* v. *Meech*, 169 U. S. 398, 415.

But even as to a person who gives up an indisputable bequest or inheritance and takes other property in exchange, it does not follow that he has received a bequest or inheritance or property with a similar non-taxable status. It must be admitted that a beneficiary would not be exempt if he took other property for his bequest, after receipt. It would also seem that he would not be exempt if an exchange were made prior to the receipt of the bequest.

Where a widow has a choice between a statutory right and the income from a trust fund established by her husband's will, the choice of the latter makes her a beneficiary. *Helvering* v. *Butterworth*, 290 U. S. 365. She is a beneficiary because she chose the trust income, but it does not follow that she would have been a beneficiary if she had insisted upon her statutory right. Her status depends upon what she takes, not upon what she gives up. The new property, not the old, determines her rights and liabilities. Similarly, where a settlement with legatees is availed of in lieu of a claim to a statutory right there is no reason or logic to justify the conclusion that the settlement has not produced taxable income because the statutory right, if it had been established, would not have produced such income.

The fallacy of petitioner's reasoning is clearly seen in the light of the fact that it logically would lead to an exemption where a legatee under a prior

will attacks a subsequent will, and compromises with the beneficiaries under the latter will. Under a logical extension of petitioner's theory the legatee could claim the exemption on the ground that he derived his entire standing to contest and ability to negotiate a compromise from the former will. Yet both the legal content of the crucial words, and their common connotation to laymen, would emphatically require a rejection of the conclusion that the legatee had actually acquired the money by bequest or devise.

Petitioner contends that he took by "inheritance" within the exemption of Sec. 22 (b) (3). Suggestion is made that Congress has used language intending to exempt from income decedent's property transferred under the direction of a probate court (Br. 13), or transferred by every statutory method or general rule of law, the examples given including laws permitting distribution of an estate in accordance with a compromise agreement (Br. 12).

We submit that Congress did not use the word in such an elastic sense. In its strictest legal meaning, and at the old common law, "inheritance" referred only to the descent of estates in land. Black's Law Dictionary (3d ed.) 963; 2 Bouvier's Law Dictionary (3d rev.) 1568; see *Center* v. *Kramer*, 112 Oh. St. 269. In its more modern usage it refers also to the succession to personalty, and indeed was selected by Congress, in preference to the word "de-

scent," on that account.' Its common use in legal parlance today is, broadly, as an alternative to transmittal by will. *Pacheco* v. *Fernandez*, 277 S. W. 197, 198." See e. g. the usage in *Mager* v. *Grima*, 8 How. 490, 493; *Frederickson* v. *Louisiana*, 23 How. 445, 447; *Maxwell* v. *Bugbee*, 250 U. S. 525, 536. In this sense property passing "by inheritance" is commonly used instead of "by intestacy" or "by laws regulating descents or distributions." Thus these expressions seem to be used interchangeably in the various state inheritance taxing acts." And in the Federal income tax statute, the provision now establishing a basis for the disposition of property acquired by "intestacy" is merely the successor, with change in form but not in content in this regard, to a provision referring to property acquired by "inheritance." [12] Section

[9] Section 213 (b) (3) of the Revenue Acts of 1918, 1921, 1924, exempted from income tax property acquired by "bequest, devise, or descent." This was changed to "inheritance" in § 213 (b) (3) of the 1926 Act, which has continued as § 22 (b) (3) of the subsequent Acts, as a word "more appropriately including both real and personal property." S. Rep. No. 52, 69th Cong., 1st Sess., p. 20.

[10] This case also shows that the word may be construed in its popular sense as including property transmitted by will, if that is necessary. Of course, § 22 (b) (3) specifically includes bequests and devises.

[11] Cf. *State ex rel. Pettit* v. *Probate Court*, 137 Minn. 238, 240. See *supra*, footnotes 3 to 5.

[12] Section 204 (a) (5) of the 1926 Act provided that property "acquired by bequest, devise, or inheritance" should have as a basis fair market value at the time of such acquisition. When the basis was changed, and made more complicated, in

22 (b) (3) is correctly interpreted by the regulations, which provide:[11]

> Property received as a gift, or received under a will or under statutes of descent and distribution, is exempt * * *.

We agree with petitioner (Br. 10 ff.), of course, that the word "inheritance" is not preserved for cases of complete intestacy. But it is not applicable, in a loose sense, to all distributions of a decedent's estate, even under supervision of a probate court. The legislative history just considered, both of the section under discussion and of the cognate basis section, demonstrates that Congress has used the word in a precise sense, and has regarded property acquired "by inheritance" as a phrase identical in meaning with property acquired "by intestacy," or "by the statutes of descent and distribution." The exemption applies only to property received from a decedent, to which the taxpayer was entitled to succeed by virtue of the laws regulating intestate succession. And indeed, even the popular dictionary defines "inheritance," apart from its signification with respect to the transmittal of physical or moral characteristics, as the acquisition of property by one person "as heir

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§ 113 (a) (5) of the 1928 Act and 1932 Act (see *infra*, p. 72), the phraseology of "by intestacy" was substituted, without any suggestion of change in content. S. Rep. No. 960, 70th Cong., 1st Sess., p. 26.

[11] Regulations 77, Art. 83, *infra*, p. 74. The same language was used in Regulations 45, Art. 73, and all subsequent regulations.

to another."[1] It will not suffice to show a receipt from a legatee, after negotiation, by one who is not privileged to proclaim that he was entitled to the property by virtue of the applicability of the intestacy laws. See 86, U. of Pa. L. Rev. 443, 444.

Petitioner relies on the fact that the property was distributed (1) under a statutory procedure, and (2) under an order of the probate court. It is submitted that these two factors are irrelevant to the question here involved. It was not an ordinary decree which judicially determined that petitioner was entitled to the property by reason of a will or the laws of intestacy; it was a consent decree which gave petitioner no inheritance but rather what the agreement provided. The statute is not a statute of descent and distribution prescribing general rights in a decedent's estate, but is merely a law assuring the more certain enforcement of will settlements, contracts of a particularly important nature, by providing the supervision of a probate court. *Baxter* v. *Treasurer & Receiver General*, 209 Mass. 459, 461, *infra*, pp. 31–32. The parties could have reached the same legal position by entering into a contract of compromise "without the aid and entirely outside of the statute." *Ibid.* Surely, their choice to have their contract enforced under the supervision of the probate court and

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[1] Webster's New International Dictionary, p. 1279: "inheritance. 1. Act of inheriting; in the broadest sense, the acquisition of property, real or personal, movable or immovable, by one person as heir to another; specif., at the common law, the acquisition of a fee simple or fee tail in land."

through a statutory mechanism does not bestow upon them an exemption from tax.

4. Judge Augustus N. Hand, in his concurring opinion, suggested that whatever the taxpayer had before the compromise was entered into (as distinguished from the property received under the compromise) was "of the nature of an inheritance" (R. 130-131), and that if value could have been placed upon those rights as of the date of death only the excess of the value of the property received over such value should be taxed. We shall discuss his theory more fully in Point II of the Argument, but we wish to emphasize that the statute does not exempt something "in the nature of an inheritance." The provision grants an exemption from tax and must be strictly construed. *Bowers* v. *Lawyers Mortgage Co.*, 285 U. S. 182; *Heiner* v. *Colonial Trust Co.*, 275 U. S. 232; *Phipps* v. *Commissioner*, 91 F. (2d) 627 (C. C. A. 10th), certiorari denied, 302 U. S. 742; *Hale* v. *State Board*, 302 U. S. 95; *Cornell* v. *Coyne*, 192 U. S. 418; *Bank of Commerce* v. *Tennessee*, 161 U. S. 134. See also *Helvering* v. *Ind. Life Ins. Co.*, 292 U. S. 371; *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U. S. 418.

B

The same conclusion will be reached if, in order to determine whether the petitioner received a bequest or inheritance, recourse is had to local law; that is, to the common law and/or the state statutes of distribution and descent and state rules of property.

¶1. It may be appropriate here briefly to consider the propriety of an inquiry into the local law, such as was undertaken by the court below. The applicable general principles are clearly stated in *Burnet* v. *Harmel*, 287 U. S. 103, 110. State law may control the application of the statute "when the federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law." But in the absence of language indicating such a purpose, the legislation "is to be interpreted so as to give a uniform application to a nationwide scheme of taxation," and with respect to terms used in the statute, irrespective of their content under state law, "the Act of Congress has its own criteria." See also *Weiss* v. *Weiner*, 279 U. S. 333, 337.

Of the many cases which have explicitly discussed the problem whether state or Federal law is to apply [11] none has been concerned with the exemption provision in question. The cases cited by the petitioner (Br. pp. 17–18) were determined on the basis of criteria found in the Federal taxing statute, with respect to particular questions there involved. They do not furnish any lantern clarifying the exemption provision under consideration here. Clearly state law controls at least to some extent the meaning and effect of wills (*Uterhart* v. *United States*, 240 U. S. 598, 603) and the devolution upon intestacy. The statutory exemption has been held to cover bequests to executors in lieu of compensation (*United States*

[11] They are collected and discussed in Paul, Selected Studies in Federal Taxation (1938), c. 1.

v. *Merriam*, 263 U. S. 179), and the provision according a basis to property acquired by inheritance has been held not to embrace the accession to complete ownership by the survivor of a tenancy by the entirety (*Lang* v. *Commissioner*, 289 U. S. 109), but these decisions, though apparently enunciating rules of nation-wide application, were grounded on general principles of property law of apparently universal acceptance. In *Irwin* v. *Gavit*, 268 U. S. 161, the Court ruled that the exemption provision assumed the gift of a corpus, and did not extend to a bequest of the income from a trust, although apparently the state law regarded the income as the legacy itself (see Mr. Justice Sutherland, dissenting at p. 169). See *Terry* v. *Commissioner*, 26 B. T. A. 1418, 1420, affirmed, 69 F. (2d) 969 (C. C. A. 5th). But *Irwin* v. *Gavit* determined a particular problem according to criteria found in the Act itself, and does not necessarily indicate that similar criteria will be furnished for all questions arising in the application of the provision exempting property acquired by "bequest, devise, or inheritance."

We have discussed above our suggestions that in view of the criteria contained in the exemption provision, and general judicial understanding, the amounts received by petitioner are not exempt. If the use of the words "bequest, devise, or inheritance" does not import a receipt from the decedent, then in our view the taxing statute involved here does not establish its own criteria, and what is a bequest or inheritance must be determined by reference to the state law.

The permissibility of such a reference is supported by the reflection that, like property rights generally, the "right to succeed to the property of the decedent depends upon and is regulated by state law (*Knowlton* v. *Moore*, 178 U. S. 41, 57)," *Uterhart* v. *United States*, *supra*, 603. Just as state law may determine to whom certain items of income flow, where tax liability attaches to ownership (see *Poe* v. *Seaborn*, 282 U. S. 101; *Blair* v. *Commissioner*, 300 U. S. 5), so here it may determine to whom the bequest or inheritance comes. Petitioner objects to the lack of uniformity which will result. But the constitutional requirement of geographic uniformity is not violated because "differences of state law * * * may bring a person within or without the category designated by Congress as taxable," *Poe* v. *Seaborn*, *supra*, 117–118. And if Federal tax statutes do not establish uniform criteria, and on that account produce geographical discriminations which may be regarded as "hard and objectionable or absurd consequences, * * * the remedy lies with the law making authority, and not with the courts." *Crooks* v. *Harrelson*, 282 U. S. 55, 60.

2. Reference to the state law, to the statutes and decisions of Massachusetts, where the estate was administered, clearly establishes that the payment in this case was not received as a bequest or inheritance, and is not exempt under the Federal statute. This view concerning the state law is succinctly expressed in the brief filed by the execu-

tors in the Bureau of Internal Revenue for the purpose of securing a full charitable bequest deduction from the gross estate of petitioner's grandmother (R. 96 *et seq.*).

The procedure which was followed in reaching the compromise was expressly authorized by a Massachusetts statute which has been in effect since 1864. See General Laws of Massachusetts, 1932, Vol. II, Sections 13–18, Appendix B, *infra*, pp. 76–78. The reason for the statute is well stated in *Baxter* v. *Treasurer & Receiver General*, 209 Mass. 459, where the court said (p. 461):

> Before the passage of this earlier statute a contest over the probate of a will could be settled by the parties interested as well as any other suit, provided they were all of age and sui juris; and the courts looked with favor upon such settlements and by proceedings in equity enforced the specific performance of them. *Leach* v. *Fobes*, 11 Gray, 506. But it frequently happened that possible future contingent interests, especially of persons not in being, stood in the way of a settlement because no one was empowered to represent them. There was also some uncertainty about carrying out the settlement even when made by persons competent to contract. If the contestant agreed to withdraw from the contest and allowed the will to be probated upon a promise by the legatees to pay him something, then it might happen that in a suit to enforce the promise

the promisee for some reason might fail to maintain his case even when the promise was in writing. * * *

In this state of the law St. 1864, c. 173, was passed. It did at least three important things. First, it provided the machinery by which any will contest might be settled no matter how complicated might be the provisions of the will as to any possible future contingent interests; second, it made the contract a matter of record, the decree admitting the will to probate specifically stating the terms of the agreement under which the contestants withdraw their opposition, thus conclusively establishing both the form and validity of the agreement; and third, it provided that the terms of the agreement should be carried out, not by the parties themselves, but by the person who should administer the will. * * *

Since the statute a will contest may be settled by the parties when all are competent to contend, without the aid, and entirely outside of the statute, in the same manner as before. * * *

The operation of the statute is succinctly described in *Copeland* v. *Wheelwright*, 230 Mass. 131, where the court said (p. 136):

> The general purpose and effect of this statute has been stated in numerous cases. Most of them are collected in *Ellis* v. *Hunt*, 228 Mass. 39, where the subject is discussed. Its design was, in cases of real controversy between persons claiming as beneficiaries under a will and the heirs at law of the de-

> ceased, to establish a means for settling that controversy and binding future contingent interests, however complicated they may be under the will. The conditions imposed by the statute for such a settlement are that (1) all persons in interest capable of acting for themselves and guardians of those persons in interest ascertained and in being, not competent to act for themselves, shall sign the agreement, (2) a guardian shall be appointed with official responsibility and duty to investigate fully and protect all unascertained and future contingent interests, and (3) the agreement must be found by the court to be just and reasonable in relation to the parties in being and in its effect upon any future contingent interests and bequests to charities, and a decree expressive of that finding must be entered.

Both of the courts below held that the amount received by a contestant under such a compromise is not a bequest or an inheritance under the Massachusetts law and decisions. There is no conflict of decisions in that State as to the nature of the payment received by a contestant through a compromise under which the will is allowed, and the estate is distributed in accordance with the will and the compromise agreement. As the Circuit Court of Appeals stated, it is well-settled that in such a case the contestant takes by purchase from those who get title under the allowed will and in effect make a transfer to him under the settlement contract,

although the transfer may take the form of a direct distribution to the contestant by the executor, as it did here. It was so held in *Ellis* v. *Hunt*, 228 Mass. 39; *Brandeis* v. *Atkins*, 204 Mass. 471; *Baxter* v. *Treasurer & Receiver General*, 209 Mass. 459; *Brown* v. *McLoughlin*, 287 Mass. 15. In the *Baxter* case a testatrix left all but $5 to two nephews, who entered into a compromise giving half of their share to a sister of the testatrix. The court held that the Massachusetts succession tax should be based on the terms of the will unaffected by the compromise agreement. Accord: *Brown* v. *McLoughlin, supra*. In so holding the court said (209 Mass. at 462):

> Under this statute the court does not undertake to admit to probate a part of the will and refuse probate as to another part. The whole will is admitted, but the concessions made by the legatees to the heirs at law or to each other are at the same time noted and made binding upon the parties. But these concessions take effect not because such is the will but because such is the agreement, and whoever takes anything or loses anything by such concessions or changes takes or loses, as the case may be, under the agreement and not under the will.[16]

[16] Petitioner suggests (Br. p. 15) that although the court found that the contestants did not take by will, it neglected to consider whether the property might not have passed to them "by the laws regulating intestate succession." It is plain that the contestants did not take by force of the laws

In *Brandeis* v. *Atkins, supra,* the court referred to provisions in the decree of the probate court similar to those in the decree here involved, and said (p. 474):

> The agreement for compromise did not become a part of the will. Although the practice is to insert a clause in the decree to the effect that the estate shall be administered in accordance with the agreement for compromise established thereby, yet the rights of the parties growing out of the agreement rest upon it and the decree confirming it, and are not testamentary rights. *Blount* v. *Wheeler,* 199 Mass. 330, 339. *Hastings* v. *Nesmith,* 188 Mass. 190. *Abbott* v. *Gaskins,* 181 Mass. 501.

Similarly, in *Ellis* v. *Hunt, supra,* with reference to such compromises, the court said that the rights of the parties, so far as they rested upon the agreement, were "contractual and not testamentary" (p. 43). See also *Forbush* v. *Home for Aged Women,* 241 Mass. 433, 435–436. The title devolves by force of the will and is then transferred according to the agreement of compromise. *Brown* v. *McLoughlin, supra,* p. 17.[17]

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regulating intestate succession, since "upon the probate of the will *the title devolves by force of the will*, and then is transferred according to the agreement of compromise." *Brown* v. *McLoughlin, supra,* 287 Mass. at 17. [Italics added.]

[17] The executors filed the Federal estate tax return on this theory, claiming as a deduction the value of the residuary bequest to a charitable trust in the will as originally written, and the Commissioner accepted that theory (R. 116). The

II

THE AMOUNT RECEIVED IN SETTLEMENT OF THE WILL CONTEST CONSTITUTED INCOME WITHIN THE MEANING OF SECTION 22 (A) OF THE REVENUE ACT OF 1932 AND THE SIXTEENTH AMENDMENT.

Section 22 (a) of the Revenue Act of 1932 (Appendix A, *infra*, p. 70) defines the term "gross income" as "gains, profits, and income" derived from a number of specified sources, including those derived from "sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property," or "gains or profits and income derived from any source whatever." Section 21 defines the term "net income" to mean the gross income computed under Section 22, less the deductions allowed by Section 23.

The taxpayer in this case was the grandson of Mary Beecher Longyear, who under the will of his grandmother was entitled to receive nothing save a portrait, a rug, and $5,000. But the fact that he was an heir gave him the right to contest her will, and if he was successful in overthrowing it and

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Board of Tax Appeals has recently held that that is the proper basis for the deduction where under the local law (in that case, Illinois) the contestants are regarded as taking by purchase under the compromise and not by bequest. See *Continental Illinois National Bank & Trust Co. of Chicago, Executor of Last Will and Testament of Fred B. Jones* v. *Commissioner*, Docket No. 87203, decided July 29, 1938, not yet reported, but found in 1938 C. C. H., Vol. 4, par. 7306. Cf. *Smith* v. *Commissioner*, 78 F. (2d) 897 (C. C. A. 1st), where the local law was otherwise and the deduction was based on compromise.

all previous wills,[18] the grandmother's estate would pass to him and to the other heirs and next of kin, as if she had died intestate. As the court below aptly stated, he was in a bargaining position and in exchange for his promise to drop the will contest and consent to the probate of the will, he in 1933 received property valued at $141,484.03.

What the taxpayer did was to receive property in consideration of his surrendering and forbearing further to pursue a claim which he had by virtue of his position as an heir contestant. The transaction may be considered in two different aspects. In one sense the taxpayer surrendered a "property" right, namely, his cause of action against the probate. In another view, he received a payment made in property to induce him to refrain from an act which would be detrimental to the legatee named in the will. In either case the result is the same, and the property settlement received by petitioner may be taxed as his income.

1. The court below adopted the theory that, when his grandmother died, the petitioner had the right to contest the probate—that he used the bargaining position to obtain property without running any risk, and that as what he relinquished had no cost basis, what he received constituted income, by in-

[18] We make this point because the record shows that there were previous wills of the same general character as the last one, and that under none of them did the heirs take anything substantial (R. 110–111).

creasing whatever he had previously had, to the full extent of its value (R. 127).

Section 22 (a) specifically takes account of income arising from "dealings in property * * *, growing out of the ownership or use of or interest in such property." Petitioner's right to contest the will was "property" in a broad sense, one embracing a chose in action. An apt designation, therefore, of the negotiations based on petitioner's right is "dealings in property." The applicability of Section 22 is readily perceived.

More particularly, the transaction has been regarded as equivalent to an exchange of property. In *Kearney* v. *Commissioner*, 31 B. T. A. 935, the Board of Tax Appeals held that the taxpayer realized income under a compromise of a will contest similar to the compromise here involved. The Board said in part (pp. 937–938):

> However, the petitioner further contends that this payment was not income to him within the meaning of the term "incomes" as used in the Sixteenth Amendment to the Constitution of the United States and, therefore, to tax the receipt of it as if it were income would be unconstitutional. He relies upon the definition of income quoted by the Court in the case of *Eisner* v. *Macomber*, 252 U. S. 189, as follows: "Income may be defined as the gain derived from capital, from labor, or from both combined." The item in controversy would seem to fall within this definition rather than without

> The petitioner apparently had some rights which he asserted or permitted to be asserted on his behalf. Then he gave up these rights in exchange for $23,333.34. The rights cost him nothing and had a basis of zero for gain or loss. Thus, from the assertion and disposition of his rights he derived a gain of $23,333.34. This was a gain derived from capital, from labor, or from both combined. It was income in the ordinary sense of the word and Congress had the power to tax it. Cf. *Lynch* v. *Hornby,* 247 U. S. 339.

2. All gains arising from sales or dealings in property are specifically taxed under Section 22 (a), and all gains upon the exchange of property are recognized, except to the extent that they are specifically excluded under Section 112 (a), *infra,* which is clearly inapplicable to the present case. Section 111 of the statute, *infra,* provides in substance, how to determine the amount of gain realized from the sale or other "disposition" of property, and is obviously applicable to the petitioner's dealings in his cause of action. It provides that the gain shall be the excess of the amount realized from the property over the basis determined as provided in Section 113. Section 113 (a) provides that the basis shall be cost, with thirteen exceptions. The only one of these exceptions which requires any consideration is Section 113 (a) (5), which provides, in part, as follows:

> If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by

> intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. * * *

It is manifest that this subsection is inapplicable. Certainly petitioner did not acquire his status as an heir and his right to contest the will by bequest or devise, nor were his rights acquired by intestacy. He did not acquire his status as an heir from the decedent upon her death. He became her heir at birth. But even if those rights were acquired upon the grandmother's death they were not acquired by "intestacy" within the meaning of the section. This provision, which is obviously *in pari materia* with the exemption from income accorded by Sec. 22 (b) (3), applies only to property which was actually part of the decedent's estate and was transmitted under the statutes of descent and distribution to those entitled to succeed to the decedent's property. *Lang* v. *Commissioner*, 289 U. S. 109. See Point I, *supra*. Hence this exception does not apply, and since it is the only one which conceivably might apply, the basis is cost.

It will be noted that in his concurring opinion Judge Augustus N. Hand held that the gain

equalled the value of the property for the reason that the petitioner had not shown what the rights to contest the will were worth. His statement as to the condition of the record is correct and would support a decision for the Government on the exchange theory, even if the basis were value at the decedent's death. We believe, however, that it would make no difference if the petitioner had shown the value of those rights at the date of death. Since those rights were not acquired *by will or intestacy,* the value at the date of death or at the date of distribution is not the basis. See Section 113 (a) (5), *infra.* Judge Hand's argument to the contrary is due to his having failed to consider the specific language of Section 113 (a) (5), and to his erroneous view that Section 22 (b) (3) should be construed to exempt something which is "of the nature of an inheritance" (R. 130–131), and that the petitioner's right to contest the will was in the nature of an inheritance.

The court below properly held the petitioner taxable on the full value of the property received, and the cost in this case to be zero, since petitioner paid nothing for whatever rights he had at the time of the compromise of the will contest (see *Helvering* v. *Gowran,* 302 U. S. 238). Obviously whatever rights the petitioner acquired he had by operation of law and without any cost whatever. Compare *Sterling* v. *Commissioner,* 93 F. (2d) 304 (C. C. A. 2d), certiorari denied, 303 U. S. 663, in which it was held that money received in satisfaction of a claim to an in-

terest in real estate constituted taxable income in full, for the reason that the claim had no value as of March 1, 1913. There the taxpayer's father had died in 1911, leaving certain real estate to her brother as remainderman, with the income therefrom to go to the brother and to two other annuitants. In 1930, after the death of these three persons, the brother's widow attempted to sell the property and a question arose as to the title. The taxpayer agreed to accept a certain sum for the release of her claim. The court held that the amount received was taxable in full for the reason that the claim apparently had no value on March 1, 1913, or that, if it did have a speculative worth, the taxpayer had not proved its value. As the court below stated in its opinion in this case, it makes no difference that the claim here may have been better founded in law than the claim in the *Sterling* case, since neither had a cost basis. What one receives for his property in excess of its cost is income. *Marine Transport Co.* v. *Commissioner*, 77 F. (2d) 177 (C. C. A. 5th).

In our view, as stated above, Section 113 (a) (5) has application only to property which was actually part of the decedent's estate, and was transmitted by virtue of his will, or under the statutes of descent and distribution to those entitled to succeed him. This section does not authorize an inquiry into the value of petitioner's right as contestant, or into the probability of success of the

attack on the will, for the purpose of substituting some other basis for cost.

It is true that, except to the extent of cost, the value of the right surrendered by petitioner will not be reflected in any reduction of the income realized upon the receipt of the property obtained on account of that surrender. This is not an unfamiliar situation in the tax law. In *Helvering* v. *Butterworth*, 290 U. S. 365, a widow surrendered her statutory rights and accepted bequest of income from a trust established by her husband's will. The Court held that she was taxable as a beneficiary under the statute, and rejected the contention that, to the extent of the value of the statutory rights which she surrendered, the income payments should be treated as a non-taxable return of the purchase price paid for the annuity. "When she makes her election the widow decides to accept the benefits of the will with the accompanying rights and liabilities. In no proper sense does she purchase an annuity" (p. 370).

Again, in *Bull* v. *United States*, 295 U. S. 247, the Court supposed the case of a partner in a firm of ship-brokers, a personal service concern, who assigned his interest to a third person for a valuable consideration. The Court dismissed the possibility that he might be able to characterize as capital his right to share in the profits of the firm. If the partner "in making return of income had valued or capitalized the right to profits which he had thus

sold, had deducted such valuation from the consideration received, and returned the difference only as gain" the Commissioner "would rightly have insisted that the entire amount received was income" (pp. 256–257).

More pertinent here, however, is the case of *United States* v. *Safety Car Heating Co.*, 297 U. S. 88. In that case the taxpayer in 1912 brought suit against another corporation to restrain the infringement of a patent and for an accounting of damages and profits. The suit was pending on March 1, 1913. An interlocutory decree for an injunction was subsequently secured and an accounting followed before a master, who determined that there was due the complainant for profits the sum of $501,180.32, of which $436,137.41 was applicable to the period before March 1, 1913. The District Court confirmed the master's report on October 10, 1923, and a final decree followed in 1924, after the infringing defendant was in the hands of a receiver. While appeals to the Circuit Court of Appeals remained undetermined, the taxpayer in 1925 accepted a settlement of $200,000, which exceeded the expense of the suit by $176,531.95. Of the latter amount $153,621.72 was attributable to acts of infringement before March 1, 1913.

On those facts this Court held that the amount received was taxable in full, rejecting the argument that part was to be excluded because on March 1, 1913, there existed a claim for previous acts of

infringement, which should be regarded as capital. The Court said (pp. 95–96, 97):

> Claims existing unconditionally before March 1, 1913, being thus excluded from the tax, the plain meaning of the regulation is that conditional or contingent claims, though they may have had an inchoate existence before March 1, 1913, are to be taxed when they are shorn of their conditional or contingent quality and become unconditional or absolute. So far as the problem to be solved depends upon the intention of the Congress in the enactment of the statute, the result is hardly doubtful.
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> Whatever obscurity exists has its origin, one may believe, in a not uncommon confusion of the rule with the exception. There is a tendency now and again to look upon March 1, 1913 as fixing a point of time when claims of every kind, no matter how contingent, became transmuted into capital, at least for taxing purposes. This is far from the truth, as the acceptance by Congress of the foregoing regulations sufficiently attests. The intention has rather been that, with exceptions specially declared or dependent upon considerations of established methods of accounting, every form of income accruing fully or unconditionally after February, 1913, shall contribute to the Treasury, though it had a potential existence for years before its capacity to fructify. * * * The case is not helped by speaking of the claim as "property." The question is whether it is property that has been trans-

> muted into capital. In February, 1913, the chose in action now assessed was not a part of the respondent's capital as merchants or other businessmen would understand the term. Cf. *North American Oil Consolidated* v. *Burnet, supra.* At best it was contingent income, the income of the future. It had no inventory value, much less a value quoted in the market. Whether it would ever be worth anything was still unknown and unknowable.' The answer was not given for many years thereafter.

These decisions, particularly the *Bull* and *Safety Car Heating Co.* cases, establish that upon the surrender of certain expectancies and claims in litigation, cost alone is the pertinent basis provided by our tax statutes. When Congress made special provision for property acquired by intestacy, with a basis equal to the "fair market value" at the time of the decedent's death or at the time of distribution, the reference was to actual property formerly part of the decedent's estate and inherited by force of statutes of descent and distribution, and not to a contingent and speculative right to contest a will.

3. If the Court accepts the view that under the compromise the petitioner obtained property in consideration of his surrender of a property right, clearly the gain realized constitutes income within the meaning of the Sixteenth Amendment as well as under the statute.

The term "income" was defined in *Stratton's Independence* v. *Howbert*, 231 U. S. 399, 415, and *Doyle* v. *Mitchell Brothers Co.*, 247 U. S. 179, 185, arising under the Corporation Excise Tax Act of 1909, as the "gain derived from capital, from labor, or from both combined." In *Eisner* v. *Macomber*, 252 U. S. 189, 207, a case arising under the Revenue Act of 1916 and the Sixteenth Amendment, this Court accepted that definition, with the proviso that it be understood "to include profit gained through a sale or conversion of capital assets." See also *Merchants' L. & T. Co.* v. *Smietanka*, 255 U. S. 509. A gain realized from a conversion of assets by an exchange obviously comes within that definition. See *Marr* v. *United States*, 268 U. S. 536. That gains from exchanges are taxable is taken for granted at the present time. See *Groman* v. *Commissioner*, 302 U. S. 82, 654; *Helvering* v. *Bashford*, 302 U. S. 454. And the surrender of the right to contest, in return for a valuable consideration, if not technically an exchange is a dealing in property sufficiently analogous to an exchange to leave no real doubt of the constitutionality of a tax upon the gain realized therefrom.

It obviously makes no difference that the property surrendered on the exchange has a basis of zero. *Helvering* v. *Gowran*, *supra*. As pointed out heretofore, the basis in this case was zero, for the reason that the surrendered rights cost nothing, and cost, not value, was the prescribed basis under the statute. There was a conversion of assets

through an exchange; the gain arising therefrom is income, whatever be the basis for measuring the gain; and it is not material that the gain taxed equals the value of the property received on the exchange. *Sterling* v. *Commissioner*, *supra*.[19]

Petitioner makes the suggestion (Br. 24) that if the heirs had any property right respecting the estate, they had the right either to the whole estate or to the whole residuary estate; that a compromise agreement therefore cannot be regarded as a sale, conversion, or exchange of assets[20] but is, in its nature a satisfaction. The Government's theory has reference not to any property right of petitioner in his grandmother's estate, as such, but to his right to litigate for part of her estate. Under a technical use of those words there may not have been a sale, conversion, or exchange of this asset, which was never received by the charity as an asset. Yet it was converted into wealth, and in every substantial sense, and for purposes of the

[19] In I. T. 1466, I-2 Cumulative Bulletin 60, it was held that where an heir sold his expectancy before the death of the decedent, he realized a gain equal to the amount received, for the reason that his expectancy cost him nothing.

[20] Petitioner cites *Hale* v. *Helvering*, 85 F. (2d) 819 (D. C. App.). The court held that the compromise of notes at less than face value resulted in an ordinary loss and not a capital loss from the "sale" or "exchange" of the notes. That case was concerned with the construction of a particular section of the Act, and considered the note as the property involved. It did not deny that surrender of the right to sue on the note, as a property right, might yield income within the Sixteenth Amendment, and indeed it did hold that the compromise gave rise to a deductible loss.

Sixteenth Amendment, there was a conversion or exchange [21] of property.

4. However, it might be suggested that there was no exchange because the petitioner's claim was of such a contingent and speculative character that it cannot be considered as representing any capital or property owned by him which he could surrender upon an exchange. While in a loose sense any claim is property, *United States* v. *Safety Car Heating Co.*, 297 U. S. 88, *supra*, pp. 45–46, indicates that a right to sue may be a special kind of "property," such that at least in some circumstances the amount received upon its realization is not identical with a gain arising from a sale or exchange. See also *Helvering* v. *Butterworth*, 290 U. S. 365; *Bull* v. *United States*, 295 U. S. 247, *supra*, pp. 43–44.

Yet if there was no exchange by the petitioner of property for other property, it follows that the legatees who transferred to the petitioner property which came to them under the will (see Point I, *supra*) were also not making an exchange. But they were not transferring the property to the petitioner as a gift, and if the consideration for the transfer was not property, it was the petitioner's promise not to engage in a course of action which might be detrimental to them.

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[21] We are using the word "exchange" to characterize this dealing in property because it is a convenient way of referring to the transaction (see *Kearney* v. *Commissioner*, 31 B. T. A. 935, 938, supra, p. 39), although there may be no exchange in a technical sense. What we say, however, applies equally to a disposition which is not technically an exchange.

It is our position that if there was no exchange, the transaction may properly be regarded as a payment made to induce the petitioner to refrain from the will contest, and that a payment made for such a consideration constitutes gain or profit or income. The payment added to the petitioner's wealth the full value of the property received, and he was free to dispose of it, without disturbing any capital which he had previously. The receipt is taxable under Section 22 (a), which includes gains or profits and income "derived from any source whatever." This was the phrase primarily relied on by the court below. The result exactly fits the definition of income in Article 41 of Regulations 77, *infra*, p. 73, which defines income as "all wealth which flows in to the taxpayer other than as a mere return of capital."

In this connection it is important to remember that this Court has held that the use of this phrase in the various Revenue Acts shows that Congress intended to exert its power to tax to the fullest extent possible and to reach pretty much every sort of income subject to the Federal power. *Helvering* v. *Midland Ins. Co.*, 300 U. S. 216, 223; *Helvering* v. *Stockholms, &c., Bank*, 293 U. S. 84, 89; *Eisner* v. *Macomber*, 252 U. S. 189; *Irwin* v. *Gavit*, 268 U. S. 161.

5. We submit that on this theory also the receipt was income within the meaning of the Sixteenth Amendment. It is our position that a payment made to induce one to refrain from a course of action which may injure another person or his property is income derived from capital or labor

or both combined within the definition of income in *Eisner* v. *Macomber, supra.* In the alternative, we contend that the definition of income in that case is not all-inclusive and that the payment here is income even though it be held that it was not derived from capital or from labor or from both combined.

There is nothing in *Eisner* v. *Macomber, supra,* that suggests that one may not derive income from a payment made to induce him to change his course of action or to refrain from using his resources in a certain way. The Government may tax gain obtained by a taxpayer by means of the employment in any way, by use or by deliberate non-use, of the sum total of his resources, whether the components thereof relate to his social or official position in life, his connections with members of the family or friends, his special techniques, etc. The gain may be said to be "derived from" his capital (including such resources) and labor combined, within the meaning of *Eisner* v. *Macomber, supra,* if these words are to be viewed broadly. And we think they should be viewed broadly, and indeed must be so viewed in order to embrace that gain which is income within the Sixteenth Amendment because it is viewed as "income" within the ordinary meaning of the term (see *e. g., Burnet* v. *Sanford & Brooks Co.,* 282 U. S. 359, 364; *United States* v. *Kirby Lumber Co.,* 284 U. S. 1, 3).

A payment made to induce one not to act or not to use one's capital, including the resources by means of which he is able to command the services

of an attorney in connection with his position as an heir of a deceased person, has its source in labor or capital as much as a gain realized through their actual use, and is truly a gain derived from labor or capital or both combined. This reasoning is supported by the decision in *Cox* v. *Helvering,* 71 F. (2d) 987 (App. D. C.), where the court held that a payment received upon an agreement not to enter upon a competing business was income. The Circuit Court of Appeals for the Second Circuit reached the same conclusion in *Salvage* v. *Commissioner,* 76 F. (2d) 112, and its holding was apparently approved by this Court (*Helvering* v. *Salvage,* 297 U. S. 106). To the same effect is *Beals' Estate* v. *Commissioner,* 82 F. (2d) 268 (C. C. A. 2d), in which the court said (p. 270):

> A promise not to work for others or for oneself is no more a conveyance of property than is a promise to enter the promisee's employ. Payment for either promise is income, not proceeds received on disposal of a capital asset. This has already been authoritatively decided. *Salvage* v. *Commissioner,* 76 F. (2d) 112 (C. C. A. 2), affirmed *Helvering* v. *Salvage,* 296 U. S. —, 56 S. Ct. 375, 80 L. Ed. — (January 13, 1936).

In the opinion of the Circuit Court of Appeals in the *Salvage* case it was stated, by way of dicta, that payments made by the Government to farmers to induce them to curtail production of hogs would be income, and the Bureau of Internal Revenue has

consistently held that payments of that character are income. See I. T. 2767, XIII–1, Cumulative Bulletin 35; I. T. 2976, XV–1, Cumulative Bulletin 138; I. T. 2992, XV–2, Cumulative Bulletin 75.

It has been held that graft money received by a public official from a construction company is income (*Chadick* v. *United States*, 77 F. (2d) 961 (C. C. A. 5th), certiorari denied, 296 U. S. 609) and that bribes are income (*United States* v. *Commerford*, 64 F. (2d) 28 (C. C. A. 2d), certiorari denied, 289 U. S. 759).[22] We think it would make no difference whether the graft or the bribe were paid to an official to induce him to act in a certain way or to refrain from acting. A bribe to a policeman to induce him to overlook a violation of a statute would clearly be income in the popular understanding of that term. Equally so, we think, would be a payment received by a blackmailer.[23] In those cases, of course, the payments are made

[22] At one time it was held that embezzled sums did not constitute income. See *Rau* v. *United States*, 260 Fed. 131 (C. C. A. 2d). But that decision was expressly overruled in *National City Bank of New York* v. *Commissioner* (C. C. A. 2d), decided July 11, 1938, not yet officially reported but found in 1938 C. C. H., Vol. 4, par. 9425. See also G. C. M. 16572, XV–1, Cumulative Bulletin 82.

[23] Many other illustrations might be given. For example, a payment made to induce one's neighbor not to rent or sell his house to an objectionable tenant would be income. In the case of *Sabatini* v. *Commissioner* (C. C. A. 2d), decided August 4, 1938, reported in 1938 C. C. H., Vol. 4, par. 9470, it was held that an author realized income by receiving a payment from a publisher for foregoing the right to authorize others to publish his uncopyrighted works.

in illegal transactions, whereas in this case and in the case of the promise not to compete in business they are made to restrain an act which is legal. But we cannot see any basis for a distinction between the two types of cases, and none was made in the *Cox, Salvage,* and *Beals' Estate* cases. We believe that the legal payment is as much income as is the illegal payment. Cf. *United States* v. *Sullivan,* 274 U. S. 259.

At this point it seems appropriate to dispose of the contentions advanced by petitioner under the alleged aegis of *Eisner* v. *Macomber, supra,* and other cases, to show that the compromise yielded no income to him for the reason that there was no gain derived from labor or from capital or from both combined.

There is no merit to the petitioner's suggestion that a transaction must have been entered into for profit to result in income; and he cites no authorities to support that view. Deductions for losses have been so restricted by statute (see Section 23 (e), Revenue Act of 1932), but the term "income" is not limited, by either the statute or the Constitution, to gains realized from transactions entered into for profit. Income may be realized unintentionally and nevertheless be income.

The major argument woven through petitioner's brief is that the amount received under the compromise was a realization of the property inherited from his grandmother, as much so as if his contest had been successful and that this realization was

not income (Br. p. 23). It is argued that if collection of a judgment on a claim would not produce taxable income (here, it would have constituted an inheritance), no gain would result from the satisfaction of the claim by way of compromise (Br. p. 27, pp. 19–22). This apparently was also the theory of the Circuit Court of Appeals for the Fourth Circuit in the case of *Magruder* v. *Segebade*, 94 F. (2d) 177, in which it was held that no income was realized upon the receipt of a cash payment by certain individuals who in consideration of the payment agreed to waive their rights under a prior will which gave them more. The court there said (p. 179):

> The results of a compromise of rights, the proceeds of which rights are not taxable, do not become taxable because the compromise was brought about by an agreement not to litigate.

We submit that the theory of the court in that case is wrong for two reasons. In the first place, it assumes that the question as to what constitutes income should be determined with reference to whether income would have been realized if something else had been done, whereas the courts have repeatedly recognized that a transaction would give rise to income if carried out in one way, while it would not if carried out in another way. See *United States* v. *Phellis*, 257 U. S. 156; *Helvering* v. *Tex-Penn Co.*, 300 U. S. 481; *Clemmons* v. *Commissioner*, 54 F. (2d) 209 (C. C. A. 5th); *Bruce* v.

Helvering, 76 F. (2d) 442 (App. D. C.); *Kennemer* v. *Commissioner*, 96 F. (2d) 177 (C. C. A. 5th). See also *Helvering* v. *Midland Ins. Co.*, 300 U. S. 216; *New Colonial Co.* v. *Helvering*, 292 U. S. 435. That is especially true when the question is whether the transaction produces *exempt* income.

There is, however, a more fundamental difficulty here. There was in this case, on the one hand, a renunciation of a course of action which might, but not positively, have led to a certain result, and, on the other hand, the adoption of a course of action which produced another result. There was not a choice of achieving the same result by different means but a choice of achieving a different result by different means. The petitioner's argument assumes that if he had contested the will or wills he would have been successful, and a share of the property would have come to him; and hence that under the agreement he merely received part of what would have come to him by inheritance. But this argument assumes what can neither be established nor taken to be true. He might have contested the will or wills, the court might have sustained the last will or a prior will as valid, and the petitioner might have received nothing. The most that can be said is that the petitioner had a highly contingent claim to a part of his grandmother's estate. He did not realize a part of his inheritance by compromising this claim, for he had no inheritance; he merely had a possibility of securing an inheritance through litigation, and he bargained

away that possibility. In other words, he forebore further to press a speculative claim to a part of his grandmother's estate, which cost him nothing, and received personal property, which was worth $141,484.03. We submit that he thereby realized a gain from an exchange which constituted income under the statute and under the Sixteenth Amendment.

The cases cited by petitioner do not bear out his suggestion that a compromise can never produce income where the recovery itself would not have been taxed. The main authorities cited by petitioner involved cases in which the plaintiff brought suit to recover for injury to his or its capital. Obviously, when plaintiff compromised the suit for a lesser amount than sufficed to repair the injury to capital, the amount received did not constitute income. But this was true not because of any abstract conceptualistic theory to the effect that a compromise does not yield income where a full recovery would not have been taxable, but because in those cases the amount received on the compromise itself constituted merely a return of capital which is not taxable income.

A detailed analysis of the cases relied upon by the petitioner will more clearly reveal their irrelevance. Thus, in *Strother* v. *Commissioner*, 55 F. (2d) 626 (C. C. A. 4th), affirmed on other grounds, 287 U. S. 314, where the taxpayer received a payment in compromise of his suit to recover the value of coal extracted from his mine by a trespasser, the court sustained his contention that the

money was in effect a return of capital. It pointed out, moreover, that if it had been proved that the amount received was in excess of the allowable depletion, the excess would have been income. Compare *Acme Land & Fur Co.* v. *Commissioner*, 84 F. (2d) 441 (C. C. A. 5th), in which it was held that a taxpayer received income when he was paid a sum by the citizens of New Orleans to reimburse him for a loss from the destruction of wild life caused by the breaking of a levee to protect New Orleans.

In *Farmers & Merchants Bank* v. *Commissioner*, 59 F. (2d) 912 (C. C. A. 6th), where a bank compromised its suit against another bank for damages to its business, the court held that the suit was based upon an injury to the good will of the business; and that an amount paid to compensate one for a loss of good will was not taxable any more than the amount paid as compensation for damages to tangible property.[24] The court clearly implied that if the amount had been paid as a restoration of profits it would have constituted income. The latter conclusion is clearly justified in view of the decision that the owner of a patent realizes income when he compromises and settles his action for profits realized by the infringer. *United States* v. *Safety Car Heating Co.*, 297 U. S. 88. See also

[24] Compare *O'Rear* v. *Commissioner*, 80 F. (2d) 473 (C. C. A. 6th), where it was held that an amount was not received from a disposition of good will but represented anticipated future income, which was taxable.

W. W. Sly Manufacturing Co. v. *Commissioner*, 24 B. T. A. 65.

Similarly, as to *Chicago & N. W. Ry. Co.* v. *Commissioner*, 66 F. (2d) 61 (C. C. A. 7th), certiorari denied, 290 U. S. 672, the moneys received as a compromise, in the suit for undermaintenance of the railway during Federal control, represented restitution of capital assets. Bureau rulings in which it has been held that one does not realize income from amounts received in settlement of claims for damages for personal injuries, for alienation of affection, or for fraud and deceit connected with a suit to annul a marriage, are based upon very much the same principle as the cases dealing with compensation paid for loss of tangible property. Damages for personal injuries compensate for the loss of capital which lies in human ability. See 31 Op. A. G. 304. In the alienation of affections and the marriage annulment cases the person compensated has lost the chance of realizing a stable and satisfactory marriage, which in a sense is capital.

Alimony is not taxed because it is thought that Congress did not intend to tax moneys received by virtue of the wife's general right to support, which attaches to her as an incident to the marriage status. *Gould* v. *Gould*, 245 U. S. 151, 153; *Douglas v. Willcuts*, 296 U. S. 1, 8. The same reasoning would also apply to amounts, also in discharge of the right to support, paid "in settlement of or in lieu of alimony" (Pet. Br. 21), even if the private

arrangements in the cases cited by petitioner, which may well have been intended to constitute a convenient means for the discharge of the husband's full obligation, are regarded as compromises.

It is true that in *Central R. Co.* v. *Commissioner*, 78 F. (2d) 697 (C. C. A. 3d), the court held that a corporation was not taxable on an amount paid in settlement of a suit brought against an officer to recover secret profits realized by a corporation organized and controlled by the officer for business operations adverse to the taxpayer. The court held that the payment was a penalty imposed on the faithless fiduciary; that it did not arise from the capital or labor of the taxpayer; and that it was not income. We believe that that decision is clearly erroneous. The officer in that case had caused the taxpayer corporation to enter into disadvantageous contracts with the corporation he had created, and the taxpayer sought to recover the profits fraudulently earned by that corporation or the damages sustained. Under the reasoning of the court in the *Safety Car Heating Co.* case, the payment made in compromise of the suit was income. See also *Farmers & Merchants Bank* v. *Commissioner, supra; H. Liebes & Co.* v. *Commissioner*, 90 F. (2d) 932 (C. C. A. 9th); *Knowland* v. *Commissioner*, 29 B. T. A. 618; *Davis* v. *Commissioner*, 35 B. T. A. 1001. In any event, the *Central R. Co.* case, *supra*, is distinguishable from the case at bar on the facts. No amount was paid to this taxpayer as a penalty for the charitable

trust's having made fraudulent profits at his expense.

Nor did the petitioner receive an amount to compensate him for a loss of tangible property or intangible property, as in the *Strother, Farmers & Merchants Bank* and *Chicago & N. W. Ry. Co.* cases, *supra*. In these cases the taxpayers had lost actual capital which was the product of expenditures. In this case, there was no destruction of capital. At best the petitioner had a highly contingent claim to a part of his grandmother's estate, which had cost him nothing, and which he might never have realized, even if he contested her wills and sought to prove that she died intestate. There has been no loss, but a gain, which has been realized from the negative use of the petitioner's resources.

The cases relied upon by the petitioner, therefore, do not establish that a payment received for refraining from a course of action which may be detrimental to another is not income derived from capital or labor or both combined within the meaning of this Court's definition in *Eisner* v. *Macomber, supra*. But if the Court should hold that there is no gain from capital or labor or from both combined, we submit that the payment is nevertheless income under the Sixteenth Amendment.

6. While this Court has often relied upon the definition of income in *Eisner* v. *Macomber, supra*, we cannot find that it has ever said that that definition is all-inclusive. The precise question there

involved was whether a dividend paid to common stockholders in common stock constituted income (see *Koshland* v. *Helvering*, 298 U. S. 441), and this Court held that it did not. In defining income as gain from capital, from labor, or from both combined, this Court stated (p. 207) that that was "the characteristic and distinguishing attribute of income essential for a correct solution of the present controversy." We think that statement suggests that the definition was not all-inclusive.

Furthermore, in this case the payment resulted in an addition to the petitioner's economic worth. This increase in his wealth was in such form that it could be used or disposed of without injuring any capital which he then had. Moreover, he received it for a consideration—namely, his promise to forego a contemplated course of action which might injure the payor. We submit that such a payment is income under the Sixteenth Amendment, even if it should be held not to constitute a gain from labor or capital.

The payment here is to be distinguished from a gift for the reason that it was received for a consideration. *Shellabarger* v. *Commissioner*, 38 F. (2d) 566, 567 (C. C. A. 7th); 1 Page, Contracts (2d Ed., 1920), § 554. Petitioner promised to forego a course of action that might injure the payor. We believe that that fact places it in a different class of receipts and that it may properly be held to be income, whether or not a gift be regarded as income.

But we believe that gifts are not *per se* excluded from income under the Sixteenth Amendment, though they are expressly exempt from tax by statute. The very fact that Section 22 (b) of the Revenue Act of 1932, *infra*, provides that certain items, including the value of gifts, are not to be included in gross income implies that Congress thought that otherwise they might be held to constitute income.[25] See *United States* v. *Oregon-Washington R. & Nav. Co.*, 251 Fed. 211, 214 (C. C. A. 2nd); *Rice* v. *Eisner*, 16 F. (2d) 358 (C. C. A. 2nd), certiorari denied, 273 U. S. 764, and the discussion in Paul and Mertens Law of Federal Income Taxation, Vol. 1, § 5.14, footnote 73. The implication conveyed by the later statute is fortified by an examination of earlier Federal and state legislation. The Act of August 27, 1894, Sec. 28, c. 349, 28 Stat. 509, 553, undertook to levy an income tax on money and the value of all personal property acquired by gift or inheritance. The Revenue Act of 1916, c. 463, 39 Stat. 756, unqualifiedly classified gifts as income. Section 4 of that Act reads:

> SEC. 4. The following *income* shall be exempt from the provisions of this title:
> * * * the value of property acquired by gift * * *. [Italics supplied.]

[25] In *United States* v. *Merriam*, 263 U. S. 179, it was held that a legacy was not income under the statute. Whether it was income within the meaning of the Sixteenth Amendment was not discussed. See also *Burnet* v. *Whitehouse*, 283 U. S. 148.

This language was reenacted in Section 1200 of the Revenue Act of 1917, c. 63, 40 Stat. 300.[26] The taxpayer who receives an accretion to his wealth which he is free to spend has undoubtedly received something which serves the purpose of income. For that reason he has realized income from the point of view of the economists. See Klein, Federal Income Taxation, 13.11; Paul and Mertens, Law of Federal Income Taxation, §§ 5.02–5.06, and footnotes; Magill, When Is Income Realized?; 46 Harvard Law Review 933.

And certainly the payment in this case, and indeed gifts as well, comply with so much of an additional requirement as may be implied from that part of the opinion in *Eisner* v. *Macomber, supra,* p. 207, which refers to "something of exchangeable value * * * *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal; * * *."

Gould v. *Gould, supra,* carries no contrary implication. That case held merely that alimony payments made to a divorced wife did not constitute income to her *within the meaning of the Revenue Act.* The case turned entirely on a question of statutory construction and it does not support a

[26] Several state legislatures have similarly evidenced their acceptance of the view that a gift is inherently income. Delaware Laws (1921), Vol. 32, c. 9, Section 3 (a); Revised Statutes of Missouri (1919), Vol. III, c. 119, Art. XIX, Section 13109; Wisconsin Statutes (1925), Vol. 1, Title 10, c. 71, Section 71.05 (1) (g); Virginia Acts of Assembly (1922), c. 463, Section 10 (3) (h).

contention that alimony could not be validly treated as income. In fact the Board of Tax Appeals has held that after the death of the divorced husband alimony payments from a trust which he created are income to the wife. *Elisabeth R. Thomas* v. *Commissioner*, decided December 17, 1937, Memorandum Opinion, unreported, Docket No. 79504.

In *Edwards* v. *Cuba Railroad*, 268 U. S. 628, this Court held that a subsidy paid to a corporation by a foreign State could not be characterized as income on the facts of that case because it represented a contribution to capital. The Court said (pp. 632–633):

> Relying on the contract for partial reimbursement, plaintiff found the money necessary to construct the railroad. The subsidy payments were proportionate to mileage completed; and this indicates a purpose to reimburse plaintiff for capital expenditures. All—the physical properties and the money subsidies—were given for the same purposes. It cannot reasonably be held that one was contribution to capital assets, and that the other was profit, gain, or income.

But such a contribution to capital is not a gift which the recipient is free to spend. Not all subsidies paid by a government are exempt. This Court has held that payments made by the Government to railroads to guarantee their operating income during the period of Federal control are income under the Sixteenth Amendment. *Texas & Pacific Ry. Co.* v. *United States*, 286 U. S. 285;

Continental Tie & L. Co. v. *United States*, 286 U. S. 290. In the former case this Court said (pp. 289-290):

> The sums received under the act were not subsidies or gifts, that is, contributions to the capital of the railroads, and this fact distinguishes cases such as *Edwards* v. *Cuba Railroad Co.*, 268 U. S. 628, where the payments were conditioned upon construction work performed. Here they were to be measured by a deficiency in operating income, and might be used for the payment of dividends, of operating expenses, of capital charges, or for any other purpose within the corporate authority, just as any other operating revenue might be applied. The Government's payments were not in their nature bounties, but an addition to a depleted operating revenue consequent upon a federal activity.

In *Helvering* v. *Claiborne-Annapolis Ferry Co.*, 93 F. (2d) 875 (C. C. A. 4th), it was held that an annual subsidy paid to a ferry company to insure continuous service was income. See also *Burke-Divide Oil Co.* v. *Neal*, 73 F. (2d) 857 (C. C. A. 7th).

The case of *Edwards* v. *Cuba Railroad, supra,* therefore, does not establish that a contribution to a corporation which it is free to use as income does not constitute income under the Sixteenth Amendment. That it may make a difference whether the gift is a contribution to capital, or whether it is an accretion to wealth that the taxpayer is free to spend, is suggested by decisions recognizing that

income may be realized through the release of a fund to income uses. Thus in *Maryland Casualty Co.* v. *United States*, 251 U. S. 342, 351–352, it was said, though not necessary to the decision, that if certain reserves set aside in 1912 were excessive and were released to the company and increased its assets in 1913, then the amount of the excess released to the general uses of the company constituted income for 1913.

See also *United States* v. *Kirby Lumber Co.*, 284 U. S. 1, where a corporation was held to realize income by issuing bonds at par and in the same year purchasing some of the bonds back at less than par. "As a result of its dealings it [the taxpayer] made available $137,521.30 assets previously offset by the obligation of bonds now extinct" (p. 3). Income is realized by a lessor when a lessee forfeits its deposit. *Commissioner* v. *Langwell Real Estate Corp.*, 47 F. (2d) 841 (C. C. A. 7th). Excessive fares collected by a railroad are income, when they cannot be returned to those who paid them. *Chicago, R. I. & P. Ry. Co.* v. *Commissioner*, 47 F. (2d) 990 (C. C. A. 7th), certiorari denied, 284 U. S. 618. Such payments are not really income which has been actually earned by labor or capital, but they have nevertheless been held to be income.

We recognize that this Court has held that it is not bound by the theories of economists in determining what is income. *Merchants' L. & T. Co.* v. *Smietanka*, 255 U. S. 509; *Helvering* v. *Midland Ins. Co.*, 300 U. S. 216; *Weiss* v. *Wiener*, 279 U. S.

333. But that is not the same thing as saying that a change in economic position is always to be disregarded. Cf. *Bowers* v. *Kerbaugh-Empire Co.*, 271 U. S. 170, and *United States* v. *Kirby Lumber Co.*, 284 U. S. 1. In the *Midland Ins. Co.* case this Court pointed out (p. 225, footnote 9) that taxability has frequently been determined without reference to factors which the accountant, the economist or the business man might deem relevant to the computation of net gain; citing *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1; *Tyee Realty Co.* v. *Anderson*, 240 U. S. 115; *Weiss* v. *Wiener*, 279 U. S. 333; *Helvering* v. *Ind. Life Ins. Co.*, 292 U. S. 371. But this Court also pointed out that this is partly attributable to the necessity of computing the tax on an annual basis. *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359; *Brown* v. *Helvering*, 291 U. S. 193; *Spring City Foundry Co.* v. *Commissioner*, 292 U. S. 182. We have seen no case holding that there is no income within the meaning of the Sixteenth Amendment although there has been an accretion to economic worth *and* that accretion has been evidenced by the receipt of specific property separable from the rest of the taxpayer's wealth and free to be used by the taxpayer as he wishes, so that the increase in worth can be said to have been realized. Treating as income a gift or other payment which constitutes an actual accretion to wealth during the taxable year, and which one is free to spend as income without injury to existing capital, presents no difficulties from the standpoint

of the necessity for accounting on an annual basis.

As previously indicated, however, we believe that the compromise in this case produced income within the meaning of the Sixteenth Amendment, whether or not a gift be regarded as income. The transaction involved either an exchange of property rights for property, which resulted in a gain, or a payment made in consideration of the petitioner's promise not to use his resources in contesting the will that might result in injury to the legatees. Upon either theory we submit that the amount which has been taxed was income.

CONCLUSION

For the reasons stated,[27] the decision of the court below should be affirmed.

Respectfully submitted.

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OCTOBER 1938.

[27] In view of the unsatisfactory nature of the pleadings on this point, we have determined not to press in this Court our equitable defenses based on the non-payment of an estate tax.

APPENDIX A

Constitution of the United States:

AMENDMENT XVI

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 21. NET INCOME.

"Net income" means the gross income computed under section 22, less the deductions allowed by section 23.

SEC. 22. GROSS INCOME.

(a) *General Definitions.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

* * *

(*b*) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this title:

* * * * *

(3) *Gifts, Bequests, and Devises.*—The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income);

* * * * *

SEC. 111. DETERMINATION OF AMOUNT OF GAIN OR LOSS.

(a) *Computation of Gain or Loss.*—Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113 (b), and the loss shall be the excess of such basis over the amount realized.

(b) *Amount Realized.*—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

(c) *Recognition of Gain or Loss.*—In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purposes of this title, shall be determined under the provisions of section 112.

* * * * *

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General Rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

* * * * *

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * * *

(5) *Property Transmitted at Death.*—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death.

* * * * *

Treasury Regulations 77, promulgated under the Revenue Act of 1932:

ART. 41. *Meaning of net income.*—The tax imposed by the Act is upon income. In the computation of the tax various classes of income must be considered:

(a) Income (in the broad sense), meaning all wealth which flows in to the taxpayer other than as a mere return of capital. It includes the forms of income specifically described as gains and profits, including gains derived from the sale or other disposition of capital assets. Cash receipts alone do not always accurately reflect income, for the Act recognizes as income-determining factors other items, among which are inventories, accounts receivable, property exhaustion, and accounts payable for expenses incurred. (See sections 22, 23, and 101 and the articles thereunder.)

(b) Gross income, meaning income (in the broad sense) less income which is by statutory provision or otherwise exempt from the tax imposed by the Act. (See section 22 and the articles thereunder.)

* * * * *

ART. 51. *What included in gross income.*—Gross income includes in general compensation for personal and professional services, business income, profits from sales of and dealings in property, interest, rent, dividends, and gains, profits, and income derived from any source whatever, unless exempt from tax by law. (See sections 22 (b) and 116.) In general, income is the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets. Profits of citizens, residents, or domestic corporations derived from sales

in foreign commerce must be included in their gross income; but special provisions are made for nonresident aliens by sections 212–215 and in certain cases for citizens and domestic corporations deriving income from sources within possessions of the United States by section 251. Income may be in the form of cash or of property. As to dividends, whether in cash or in property, see section 115 and articles 621–629.

* * * * *

ART. 83. *Gifts and bequests.*—Property received as a gift, or received under a will or under statutes of descent and distribution, is exempt from the income tax, although the income therefrom derived from investment, sale, or otherwise is not. An amount of principal paid under a marriage settlement is a gift. Neither alimony nor an allowance based on a separation agreement is taxable income. (See article 281.)

ART. 596. *Property transmitted at death.*—In the following cases the basis of property acquired after February 28, 1913, shall be the fair market value of the property at the time of the death of the decedent:

(1) Personal property acquired by specific bequest;

(2) Real property acquired by general or specific devise or by intestacy; and

(3) Property, whether real or personal, in the hands of a decedent's estate, acquired by the estate from the decedent (see article 863).

In all other cases where property was acquired either by will or by intestacy after February 28, 1913, the basis shall be the fair market value of the property at the time of its distribution to the taxpayer.

In the case of property transferred in trust to pay the income for life to or upon

the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death. Accordingly, if a person is entitled to personal property under such a trust instrument after the grantor's death and if such property would be deemed to be acquired by bequest, other than by specific bequest, were the trust instrument a will, the basis of the property, if acquired after February 28, 1913, would be its fair market value at the time it was distributed to the taxpayer. In all other cases where a person is entitled to property, whether real or personal, under such a trust instrument after the grantor's death, the basis of the property, if acquired after February 28, 1913, shall be its fair market value at the time of the grantor's death.

If the property was acquired prior to March 1, 1913, the basis shall be determined as provided in section 113 (a) (13) and article 606.

For the purposes of this article, the value of property as appraised for the purpose of the Federal estate tax or in the case of estates not subject to that tax, its value as appraised in the State court for the purpose of State inheritance taxes shall be deemed to be its fair market value at the time of the death of the decedent.

APPENDIX B

General Laws of Massachusetts, Tercentenary Edition (1932), Vol. II, c. 204:

SECTION 13. The probate court may authorize an executor, administrator, guardian, conservator, receiver, commissioner or other fiduciary officer appointed by it, or a trustee, to adjust by arbitration or compromise any demand in favor of or against the estate by him represented.

SECTION 14. The supreme judicial court or the probate court may authorize an executor, administrator, guardian, conservator, receiver, commissioner or other fiduciary officer appointed by the probate court, or a trustee, to adjust by arbitration or compromise any controversy or question as to the administration or distribution of the estate in his possession, or as to his accounting therefor, or as to any matter relating to said estate, or as to the construction of a will or trust created by a written instrument, or as to his power and authority thereunder, or as to any controversy growing out of said will or instrument that may arise between him and any other person or the guardian or conservator of any person interested under said will or instrument or in said estate, or between claimants or the guardians or conservators of claimants to said estate, to which arbitration or compromise, in the form of an agreement in writing, such executor, administrator, guardian, conservator, receiver, commissioner or other fiduciary officer or trustee,

and all other persons in being and of full age and not under guardianship, and the guardian or conservator, if any, of all other persons who claim a vested interest in said estate, whose interests will, in the opinion of the court, be affected by the proposed arbitration or compromise, shall be parties. An award or compromise made in writing in such a case, if found by the court to be just and reasonable in its effects upon the interests of minors and persons under guardianship or conservatorship, and upon any future contingent interests in said estate, shall, when approved by the court, be valid and binding upon all such interests and upon the original parties to said agreement, and a decree shall be entered accordingly. If the court finds that any minor or person without legal capacity or under guardianship, or any future contingent interests, may be affected, it may appoint some person or persons to represent such minor or person without legal capacity or under guardianship, or future contingent interests in such controversy, question, administration or account upon such conditions as to costs as it may order.

SECTION 15. The supreme judicial court or the probate court may authorize the persons named as executors in an instrument purporting to be the last will of a person deceased, or the petitioners for administration with such will annexed, to adjust by arbitration or compromise any controversy between the persons who claim as devisees or legatees under such will and the persons entitled to the estate of the deceased under the laws regulating the descent and distribution of intestate estates, to which arbitration or compromise the persons named as executors, or the petitioners for administration with

the will annexed, as the case may be, those claiming as devisees or legatees whose interests will in the opinion of the court be affected by the proposed arbitration or compromise, and those claiming the estate as intestate, shall be parties.

SECTION 16. If the court finds that any future contingent interests which would arise under said will if admitted to probate would be affected by the arbitration or compromise, it shall appoint some person to represent such interests in such controversy, and the court shall have like power as to any bequests made in the will for charitable purposes, if no trustees have been appointed in such will; in both cases with such conditions as to costs as the court orders.

SECTION 17. An award or compromise made in writing in any such case, if found by the court to be just and reasonable in relation to the parties in being and in its effect upon any future contingent interests that might arise under such will and upon any bequests to charities made in the same, shall be valid and binding upon such interests and upon such bequests, as well as upon the interests of all persons in being, but it shall not impair the claims of creditors.

SECTION 18. If a minor or a person under guardianship or conservatorship is a necessary party to an arbitration or compromise under section fifteen, he shall be represented in the proceedings by his guardian or conservator, or by a guardian ad litem appointed by the court, who shall in the name and in behalf of the party he represents, make and receive all proper conveyances and payments necessary to carry into effect any award or compromise sanctioned by the court.

U. S. GOVERNMENT PRINTING OFFICE, 1939

SUPREME COURT OF THE UNITED STATES.

No. 48.—October Term, 1938.

Munro L. Lyeth, Petitioner,
vs.
James J. Hoey, Collector of Internal Revenue for the United States for the Second District of the State of New York.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 5, 1938.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The question presented is whether property received by petitioner from the estate of a decedent in compromise of his claim as an heir is taxable as income under the Revenue Act of 1932.

Petitioner is a grandson of Mary B. Longyear who died in 1931, a resident of Massachusetts, leaving as her heirs four surviving children and the petitioner and his brother, who were sons of a deceased daughter. By her will, the decedent gave to her heirs certain small legacies and the entire residuary estate, amounting to more than $3,000,000, was bequeathed to trustees of a so-called Endowment Trust, created April 5, 1926, the income from which was payable to another set of trustees under another trust described as the Longyear Foundation. The main purpose of the latter trust was to preserve "the records of the earthly life of Mary Baker Eddy," the founder of the Christian Science religion.

When the will was offered for probate in Massachusetts there was objection by the heirs upon the grounds, among others, of lack of testamentary capacity and undue influence. After hearing, at which a statement was made by the respective parties of their proposed evidence, the probate court granted a motion for the framing of issues for trial before a jury. In that situation a compromise agreement was entered into between the heirs, the legatees, the devisees and the executors under the will, and the Attorney General of Massachusetts. This agreement provided that the will should be admitted to probate and letters testamentary issued; that the specific and pecuniary bequests to individuals should be enforced; that the bequest of the residuary estate to the Endowment Trust should be disregarded; that $200,000 should be paid to the heirs

and a like amount to the Endowment Trust, and that the net residue of the estate, as defined, should be equally divided between the trustees of the Endowment Trust and the heirs. The net residue to which the heirs were thus entitled was to be payable in units of stock owned by the decedent in certain corporations, Longyear Estate, Inc., Longyear Corporation and Longyear Realty Corporation, and for that purpose a unit was to consist of three shares, one share of each corporation.

The compromise was approved by the probate court pursuant to a statute of Massachusetts (Mass. Gen. Laws 1932, Chap. 204, Secs. 15-17) and a decree was entered on April 26, 1932, admitting the will to probate, issuing letters testamentary to the executors and directing them "to administer the estate of said deceased in accordance with the terms of said will and said agreement of compromise". Owing to the depression and the necessity of discharging pecuniary legacies amounting to about $300,000, which were entitled to priority in payment before distribution of the residue, the heirs undertook to finance one-half of these legacies and the residuary legatees the other one-half. For this purpose the heirs formed a corporation known as Longyear Heirs, Inc., to which they assigned their interests in the estate in exchange for common stock. Preferred stock was issued to the pecuniary legatees.

In July, 1933, the executors distributed to Longyear Heirs, Inc., as assignee of the petitioner, his distributable share of the estate consisting of $80.17 in cash and a certificate of deposit for 358 units, each unit representing one share of each of the three corporations mentioned in the compromise agreement. The Commissioner of Internal Revenue valued this distributable share at $141,484.03 and treated the whole amount as income for the year 1933 in which it was received. An additional tax of $56,389.65 was assessed which petitioner paid in October, 1936, with interest. Claim for refund was then filed and on its rejection this suit was brought against the collector.

On motion of petitioner the District Court entered a summary judgment in his favor (20 F. Supp. 619) which the Circuit Court of Appeals reversed. 96 F. (2d) 141. Because of a conflict with the decision of the Circuit Court of Appeals of the Fourth Circuit in *Magruder* v. *Sagebade*, 94 F. (2d) 177, certiorari was granted. May 31, 1938.

The Court of Appeals overruled the contentions of petitioner that the property he received was within the statutory exemption

(Section 22(b) (3) of the Revenue Act of 1932) and, further, that the property was not income either under the statute or under the Sixteenth Amendment of the Federal Constitution. As the view of the Court of Appeals upon these questions determined the rights of the parties, it was found unnecessary to discuss certain affirmative defenses set up by the answer of the respondent and these defenses are not pressed in this court.

First.—By Section 22(b) (3) of the Revenue Act of 1932, there is exempted from the income tax—

"The value of property acquired by gift, bequest, devise, or inheritance. . . ".

Whether property received by an heir from the estate of his ancestor is acquired by inheritance, when it is distributed under an agreement settling a contest by the heir of the validity of the decedent's will, is a question upon which state courts have differed. The question has arisen in the application of state laws of taxation. In Massachusetts, the rule is that when a will is admitted to probate under a compromise agreement, the state succession tax is applied to the property "that passes by the terms of the will as written and not as changed by any agreement for compromise". *Baxter* v. *Treasurer*, 209 Mass. 459, 463. Although under the Massachusetts statute relating to compromise[1] it is the practice to insert a clause in the court's decree that the estate is to be administered in accordance with the agreement, "yet the rights of the parties so far as they rest upon the agreement are contractual and not testamentary". *Ellis* v. *Hunt*, 228 Mass. 39, 43. See, also, *Brandeis* v. *Atkins*, 204 Mass. 471, 474; *Copeland* v. *Wheelwright*, 230 Mass. 131, 136. Thus, when a contest was withdrawn under a compromise and the residuary estate was divided equally between the legatee and the heirs, it was held that the tax was properly levied upon the entire residuary legacy and that the administrators with the will annexed had no right to pay out of the share transferred to the heirs one-half of the tax thus collectible from the legatee unless the compromise agreement expressly or impliedly so provided. *Brown* v. *McLoughlin*, 287 Mass. 15, 17. Several States have a similar rule.[2] In other States the amount

[1] Massachusetts General Laws 1932, Chap. 204, Sects. 13-18.

[2] See Matter of Cook, 187 N. Y. 253; English v. Crenshaw, 120 Tenn. 531; Estate of Wells, 142 Iowa 255; Estate of Graves, 242 Ill. 212; Estate of Rossi, 169 Cal. 148; Cochran's Executor v. Commonwealth, 241 Ky. 656; MacKenzie v. Wright, 31 Ariz. 272; In re O'Neill, 111 N. J. Eq. 378; Lynchburg Bank v. Commonwealth, 162 Va. 73.

received by an heir under an agreement compromising a contest of his ancestor's will is considered to be received by virtue of his heirship and is subject to an inheritance tax unless the statute exempts him.[3]

In the instant case, the Court of Appeals applied the Massachusetts rule, holding that whether the property was received by way of inheritance depended "upon the law of the jurisdiction under which this taxpayer received it". We think that this ruling was erroneous. The question as to the construction of the exemption in the federal statute is not determined by local law. We are not concerned with the peculiarities and special incidences of state taxes or with the policies they reflect. Undoubtedly the state law determines what persons are qualified to inherit property within the jurisdiction. *Mager* v. *Grima*, 8 How. 490, 493; *Maxwell* v. *Bugbee*, 250 U. S. 525, 536, 537. The local law determines the right to make a testamentary disposition of such property and the conditions essential to the validity of wills, and the state courts settle their construction. *Uterhart* v. *United States*, 240 U. S. 598, 603. The State establishes the procedure governing the probate of wills and the processes of administration. Petitioner's status as heir was thus determined by the law of Massachusetts. That law also regulated the procedure by which his rights as an heir could be vindicated. The state law authorized its courts to supervise the making of agreements compromising contests by heirs of the validity of an alleged will of their ancestor, in order that such compromises shall be just and reasonable with respect to all persons in interest.[4] But when the contestant is an heir and a valid compromise agreement has been made and there is a distribution to the heir from the decedent's estate accordingly, the question whether what the heir has thus received has been "acquired by inheritance" within the meaning of the federal statute necessarily is a federal question. It is not determined by local characterization.

In dealing with the meaning and application of an act of Congress enacted in the exercise of its plenary power under the Constitution to tax income and to grant exemptions from that tax, it is the will of Congress which controls, and the expression of its

[3] See Pepper's Estate, 159 Pa. 508; Taber's Estate, 257 Pa. 81; Taylor v. Georgia, 40 Ga. App. 295; People v. Rice, 40 Colo. 508; State v. Probate Court, 143 Minn. 77; Estate of Thorson, 150 Minn. 464. Compare Barber v. Westcott, 21 R. I. 355.

[4] See Note 1. Such agreements are "entirely valid outside of the statute". Ellis v. Hunt, 228 Mass. 39, 44.

will, in the absence of language evidencing a different purpose, should be interpreted "so as to give a uniform application to a nationwide scheme of taxation". *Burnet* v. *Harmel*, 287 U. S. 103, 110. Congress establishes its own criteria and the state law may control only when the federal taxing act by express language or necessary implication makes its operation dependent upon state law. *Burnet* v. *Harmel*, *supra*. See *Burk-Waggoner Association* v. *Hopkins*, 296 U. S. 110, 111, 114; *Weiss* v. *Wiener*, 279 U. S. 344, 356; *Morrissey* v. *Commissioner*, 296 U. S. 344, 356. Compare *Crooks* v. *Harrelson*, 282 U. S. 55, 59; *Poe* v. *Seaborn*, 282 U. S. 101, 109, 110; *Blair* v. *Commissioner*, 300 U. S. 5, 9, 10. There is no such expression or necessary implication in this instance. Whether what an heir receives from the estate of his ancestor through the compromise of his contest of his ancestor's will should be regarded as within the exemption from the federal tax should not be decided in one way in the case of an heir in Pennsylvania or Minnesota and in another way in the case of an heir in Massachusetts or New York,[5] according to the differing views of the state courts. We think that it was the intention of Congress in establishing this exemption to provide a uniform rule.

Second.—In exempting from the income tax the value of property acquired by "bequest, devise, or inheritance", Congress used comprehensive terms embracing all acquisitions in the devolution of a decedent's estate. For the word "descent", as used in the earlier acts,[6] Congress substituted the word "inheritance" in the 1926 act and the subsequent revenue acts as "more appropriately including both real and personal property."[7] Thus the acquisition by succession to a decedent's estate whether real or personal was embraced in the exemption. Further, by the "estate tax", Congress has imposed a tax upon the transfer of the entire net estate of every person dying after September 8, 1916,[8] allowing such exemptions as it sees fit in arriving at the net estate. Congress has not indicated any intention to tax again the value of the property which legatees, devisees or heirs receive from the decedent's estate.

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[5] See Notes 2 and 3.

[6] See Act of October 3, 1913, Chap. 16, Section II, 38 Stat. 167; Revenue Acts of 1918, 1921 and 1924, Section 213 (b) (3).

[7] Revenue Act of 1926, Section 213 (b) (3); Acts of 1928 and 1932, Section 22 (b) (3). Sen. Rep. No. 52, 69th Cong., 1st Sess., p. 20.

[8] Act of September 8, 1916, Chap. 463, Title II, 39 Stat. 777.

Petitioner was concededly an heir of his grandmother under the Massachusetts statute. It was by virtue of that heirship that he opposed probate of her alleged will which constituted an obstacle to the enforcement of his right. Save as heir he had no standing. Seeking to remove that obstacle, he asserted that the will was invalid because of want of testamentary capacity and undue influence. In accordance with local practice, he asked the probate court to frame these issues for a jury trial. It then became necessary for him to satisfy the court that the issues were substantial. Issues are not to be framed unless it appears from statements by counsel of expected evidence or otherwise that there is a "genuine question of fact supported by evidence of such a substantial nature as to afford ground for reasonable expectation of a result favorable to the party requesting the framing of issues". *Briggs* v. *Weston*, 2 N. E. (2d) 466; *Smith* v. *Patterson*, 286 Mass. 356. Petitioner satisfied that condition and the probate court directed the framing of jury issues. It was in that situation, facing a trial of the issue of the validity of the will, that the compromise was made by which the heirs, including the petitioner, were to receive certain portions of the decedent's estate.

There is no question that petitioner obtained that portion, upon the value of which he is sought to be taxed, because of his standing as an heir and of his claim in that capacity. It does not seem to be questioned that if the contest had been fought to a finish and petitioner had succeeded, the property which he would have received would have been exempt under the federal act. Nor is it questioned that if in any appropriate proceeding, instituted by him as heir, he had recovered judgment for a part of the estate, that part would have been acquired by inheritance within the meaning of the act. We think that the distinction sought to be made between acquisition through such a judgment and acquisition by a compromise agreement in lieu of such a judgment is too formal to be sound, as it disregards the substance of the statutory exemption. It does so, because it disregards the heirship which underlay the compromise, the status which commanded that agreement and was recognized by it. While the will was admitted to probate, the decree also required the distribution of the estate in accordance with the compromise and, so far as the latter provided for distribution to the heirs, it overrode the will. So far as the will became effective under the agreement it was because of the heirs' consent and release and in consideration of the distribution they received

by reason of their being heirs. Respondent agrees that the word "inheritance" as used in the federal statute is not solely applicable to cases of complete intestacy. The portion of the decedent's property which petitioner obtained under the compromise did not come to him through the testator's will. That portion he obtained because of his heirship and to that extent he took in spite of the will and as in case of intestacy. The fact that petitioner received less than the amount of his claim did not alter its nature or the quality of its recognition through the distribution which he did receive.

We are not convinced by the argument that petitioner had but "the expectations" of an heir and realized on a "bargaining position". He was heir in fact. Whether he would receive any property in that capacity depended upon the validity of his ancestor's will and the extent to which it would dispose of his ancestor's estate. When, by compromise and the decree enforcing it, that disposition was limited, what he got from the estate came to him because he was heir, the compromise serving to remove *pro tanto* the impediment to his inheritance. We are of the opinion that the exemption applies.

In this view we find it unnecessary to consider the other questions that have been discussed at the bar.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.